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CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 574

GENERAL MOTORS ACCEPTANCE CORPORATION ET AL.

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED DECEMBER 14, 1931.

(36,388)

(36,388)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 17, 1931

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 6584

GENERAL MOTORS ACCEPTANCE CORPORATION, a Corporation, Intervener and Appellant,

vs.

UNITED STATES OF AMERICA, Libelant and Appellee; ONE (1) CHEVROLET SEDAN AUTOMOBILE, Engine Number 1-247-061, Respondent

GENERAL MOTORS ACCEPTANCE CORPORATION, a Corporation, Intervener and Appellant,

vs.

UNITED STATES OF AMERICA, Libelant and Appellee; ONE (1) CHEVROLET COUPE AUTOMOBILE, Engine Number 113-462, Respondent

GENERAL MOTORS ACCEPTANCE CORPORATION, a Corporation, Intervener and Appellant,

vs.

UNITED STATES OF AMERICA, Libelant and Appellee; ONE (1) CHEVROLET ROADSTER AUTOMOBILE, Engine Number 966-050, Respondent

HOWARD AUTOMOBILE COMPANY OF LOS ANGELES, a Corporation, Intervener and Appellant,

vs.

UNITED STATES OF AMERICA, Libelant and Appellee; ONE (1) BUICK COUPE AUTOMOBILE, Engine Number 2-083-140, Respondent

On Appeal from the District Court of the United States for the Southern District of California, Southern Division

[fol. 2] **Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, under Section 239, Amended, of the Judicial Code [28 U. S. C. A. 346]—** Filed Nov. 30, 1931

STATEMENT OF CASE

The record presents four consolidated automobile forfeiture cases in which the same disputed legal questions are involved.

On four different dates during July and August, 1930, the four automobiles whose forfeiture is in issue were seized at ports of entry on the Mexican border, each vehicle having liquor concealed therein. Three of the cars were seized at San Ysidro, California, and the fourth at Calexico, California. Each car was observed crossing the international boundary line from Mexico and traveling some distance thereafter in the United States, and in each instance the concealed liquor was discovered at an official stopping place of the United States Customs Service. The seizures were effected by Customs officers.

All four drivers of the cars were arrested. Each was charged with violations of the Tariff Act of 1930; namely, unlawfully importing liquor into the United States, and knowingly concealing and facilitating the transportation of such liquor. Each indictment alleged failure to obtain a permit, failure to pay duties, and failure to make entry at the custom house. The four defendants entered pleas of guilty to the first count, which charged importation, and were sentenced by the court. In each case, the remaining count was dismissed.

A libel of information in rem was filed by the United States attorney against each automobile, claiming its forfeiture under the provisions of Sections 3061 and 3062 of the Revised Statutes [19 U. S. C. A. 482 and 483]. In three of the cases the General Motors Acceptance Corporation intervened as owner of the attached automobiles, and in the other case the vehicle was claimed by the Howard Automobile Company. All the interveners set up proof of ownership, averred that they were innocent of any illegal acts in which the vehicles may have been involved, and prayed the court to dismiss the libels, contending that the government's sole remedy was under Section 26, Title II, of the National Prohibition Act [27 U. S. C. A. 40].

[fol. 3] In each case, it was stipulated that the liquor alleged to have been found in the automobile was intoxicating in fact and fit for beverage purposes. It was further stipulated, subject to the objection by the libelant that such a purported defense was incompetent, irrelevant and immaterial, that neither the seller nor the intervener had any notice of the illegal use, or intended illegal use, of the automobile.

The government offered in evidence at the forfeiture proceedings the judgment roll, consisting of the indictment and sentence, in the criminal cases, at which, as stated above, pleas of guilty had been entered. The intervener in each case objected to the introduction of this judgment roll, on the ground that it was incompetent, irrelevant and immaterial; that no proper foundation had been laid; that the roll was not binding upon the intervener; and that it did not show that the intervener was a party to the criminal action or had notice of it. The objections were overruled and the records were admitted in evidence, to which the respective interveners duly excepted.

Testimony of customs officers showed that the four automobiles were driven across the international boundary some distance into the United States before being searched and seized.

The District Court entered decrees of forfeiture in all four cases, finding that each automobile "was engaged in smuggling dutiable merchandise into the United States in violation of the customs laws thereof".

All four interveners have appealed to this court.

For a proper decision of the above-entitled cause, now pending on appeal and submitted for consideration, instructions are respectfully requested of the Supreme Court of the United States in the following questions of law, concerning which we are in doubt:

QUESTIONS CERTIFIED

1. Does Section 26 of Title II of the National Prohibition Act repeal by implication and render inoperative in liquor importation and transportation cases the forfeiture provisions of the Customs Laws, in so far as offending vehicles are concerned? Or, putting the question in another form:

2. Do the mandatory provisions of Section 26 of the National Prohibition Act apply when the automobile has been seized while in the act of transporting intoxicating liquor across the border and some distance into the United States?

[fol. 4] 3. May the government, in such a case, ignore such mandatory provisions, arrest the driver, and elect to forfeit the automobile under the customs laws?

4. Is the record in the criminal case wherein the driver pleaded guilty of violating the customs laws [Tariff Act of 1930] admissible in the separate forfeiture proceedings wherein the intervener is the only party appearing, for the purpose of showing unlawful importation by the automobile, or for any other purpose?

In connection with the first three questions herein certified, we desire respectfully to make the following observation:

Since the Supreme Court of the United States handed down its decision in the cases of Richbourg Motor Company v. United States and Davies Motors, Incorporated v. United States, on May 19, 1930, reported in 281 U. S. 528-537, there has developed considerable divergence of opinion among the various District Courts and Circuit Courts of Appeal, as to the application of that decision to a state of facts identical or similar to that set forth herein; that is to say, to a case in which, as here, the entire proceedings were had under the provisions of the Tariff Act, the seizures having been effected by Customs officers.

We collate below a few cases in each group:

First, those holding that, in a state of facts identical or similar to that found in the instant cases, the Richbourg-Davies decision applies, and the officers must proceed under the less rigorous provisions of the National Prohibition Act, Title II, Section 26:

United States v. Ford Coupe Automobile (D. C. Fla.), 43 F. (2d) 212; United States v. One Studebaker Automobile (Exporters' Ins. Co., Intervener) (D. C. Ariz.), 45 F. (2d) 430; The Sebastopol-The Ruth Mildred; United States v. Soderberg (D. C., N. Y.), 47 F. (2d) 336; Colon v. Hanlon, Federal Prohibition Adm'r, et al. (C. C. A. 1), 50 F. (2d) 353. See also United States v. One Packard Motor Truck (D. C. Mich.) 284 F. 394, 396, and cases there cited.

Second, cases holding that the Richbourg-Davies decision does not apply, and that the officers need not proceed under the provisions of Section 26, Title II, of the National Prohibition Act:

[fol. 5] The Pilot (C. C. A. 4), 43 F. (2d) 491; United States v. One Fargo Truck (D. C. Tex.), 46 F. (2d) 171;

United States v. One Reo Coupe Automobile (D. C. Mass.), 46 F. (2d) 815; The Daisy (D. C. Del.), 48 F. (2d) 370.

Dated November 23, 1931.

Curtis D. Wilbur, William H. Sawtelle, Judges of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

[File endorsement omitted.]

A true copy. Attest December 1, 1931.

Paul P. O'Brien, Clerk. (Seal United States Circuit Court of Appeals, Ninth Circuit.)

Endorsed on cover: File No. 36,388. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 574. General Motors Acceptance Corporation et al. vs. The United States of America. Certificate. Filed December 14, 1931. File No. 36,388.

FILE COPY

APR 4 19

Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 574.

GENERAL MOTORS ACCEPTANCE CORPORATION, *et al.*,

vs.

THE UNITED STATES OF AMERICA.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR INTERVENOR-APPELLANT BELOW.

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ANTHONY J. RUSSO,
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The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

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Supreme Court of the United States.

OCTOBER TERM 1931
No. 574.

GENERAL MOTORS ACCEPTANCE CORPORATION *et al.*

AGAINST

THE UNITED STATES OF AMERICA

BRIEF FOR INTERVENOR-APPELLANTS BELOW, ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Statement.

The automobiles involved in these cases were observed crossing the Mexican border by customs officials. After the automobiles had been driven some short distance into the United States, they were stopped and seized by those officials, and the Government then instituted forfeiture proceedings against the vehicles by libels under Sections 3061 and 3062 of the Revised Statutes (U. S. C., Title 19, Sec. 482, 483), which provide for forfeiture under the Customs Laws. The intervenors are assignees of the conditional vendors of the vehicles in question, and, as innocent lienors, interposed petitions for the dismissal of the libels, contending that the forfeitures should have been prosecuted under Section 26, Title II, of the National Prohibition Act (c. 85, 41 Stat. 305, 315; U. S. C., Title 27, Sec. 40), rather than under the Customs Act. The petitions of the intervenors were denied by the District Court and the automobiles ordered forfeited under the libels of the Government. On appeal, the Circuit Court of Appeals for the Ninth Circuit certified these questions to this Court.

The Question at Issue—Origin and Development.

The main question at issue in these cases is whether in this situation the Government is or is not bound, by the apparently mandatory provisions of Section 26 of the National Prohibition Act, to proceed under that section in libels for forfeiture, whenever a vehicle is seized in the act of transporting intoxicating liquor contrary to law, or whether the Government may disregard the provisions of Section 26, which protects the interests of an innocent lienor, and bring the libels for forfeiture under the Customs Act Sections 3061-2, which confiscate the interests of the innocent lienor.

For many years prior to the National Prohibition Act and, in fact, prior to the existence of automobiles or the relatively widespread use of conditional sale liens, the interests of innocent lienors cut no figure in cases of forfeiture of vehicles for transportation of liquor contrary to law, because forfeiture was absolute whether it was decreed in a libel under Sections 3061-2 of the Customs Law, for unlawful importation of liquor in violation of the customs duties levied thereon under the Act, or under Section 3450 of the Internal Revenue Law for evasion of the internal revenue taxes applicable to liquor.

The National Prohibition Act continued the policy of confiscating vehicles used as devices to violate it, but with the very significant change that Section 26, Title II, concerning such forfeitures, provides that the interests of innocent lienors in such vehicles are to be saved.

Following the National Prohibition Act, the Government proceeded to the enforcement not only of the Prohibition Act, but also of the Internal Revenue and Customs Laws. The seizure of automobiles for violation of the provisions of those laws immediately brought into collision the respective forfeiture provisions, namely, Section 26, Section 3450

and Sections 3061-2. The question whether the Government might properly choose to proceed under any one of those sections, or whether it was bound, in forfeiture cases, to proceed under Section 26 of the Prohibition Act, was litigated more prominently in connection with Section 3450 under the Internal Revenue Laws. As suggested in the statement of the Court below in its certificate (4), this was settled by the unanimous decision of this Court in the case of *Richbourg Motor Co.* v. *United States,* 281 U. S. 528, dealing with the relation of Section 26 of the Prohibition Act and Section 3450 of the Internal Revenue Act, to the effect that the confiscation and forfeiture of vehicles used for the transportation of intoxicating liquor must, as between them, be conducted under the provisions of Section 26. It did not specifically dispose of the relation, in cases of transportation of liquor by vehicles, of Section 26 of the Prohibition Act and Sections 3061-2 of the Customs Laws.

More specifically, therefore, the question may be said to be whether the same or similar considerations which constitute the basis of the decision in the *Richbourg Motor Co.* case render the forfeiture of vehicles under Section 26 of the Prohibition Act, as against proceedings under the forfeiture provisions of the Customs Law, just as mandatory as they have been determined with respect to Section 3450.

ARGUMENT.

In connection with the forfeiture of vehicles for transporting liquor across the Border, Sections 3061-2 are as thoroughly in conflict with Section 26 as is Section 3450.

As in the *Richbourg* case, *supra*, this question resolves itself essentially into the problem of ascertaining the purpose and intention of Congress from its expressions in the material statutes.

The National Prohibition Act, Section 12, forbids the manufacture, sale, transportation, *importation* and exportation of intoxicating liquor, except as authorized in the Act. By drawing to itself the importation of intoxicating liquor among the other prohibitions, the Act plainly and expressly condemns importation with the same force applied to the others. The importation of forbidden liquor by transportation of it in a vehicle driven across the border is a clear violation of the Prohibition Act, and therefore brought within the orbit of its penalties, one of which is forfeiture, under the provisions of Section 26, of the vehicle used in the illicit transportation. Both the provisions and policy of the National Prohibition Act are offended thereby, and once within the scope of the Act, the manner of forfeitures of vehicles so used is specified in Section 26. Here, in other words, is a single, complete, coherent system for the suppression of the liquor traffic, whether manifested by manufacture, transportation or importation. The sweeping and comprehensive language of Section 26, alluded to by this Court in the *Richbourg* case, is an example. It preempts the field of transportation, making no refinements or allowances for distinctions. It unequivocally provides that

> "* * * when * * * any officer of the law shall discover any person in the act of transporting, in viola-

> tion of the law, intoxicating liquors * * * he shall take possession of the vehicle * * * shall at once proceed against the person arrested, and upon the conviction of such person shall sell the vehicle and pay all liens according to their priorities."

It is submitted that it is against the background of the single system represented by that Act that the relation of the sections of the other laws affecting intoxicating liquors to it should be judged.

With the passage of the National Prohibition Act, the question naturally arose whether it had, by necessary implication, repealed the internal revenue taxes and the customs duties on the forbidden liquor. The incongruity of an obligation to pay a tax on an article, the possession or importation of which had become unlawful, led to this Court's decision, in *United States* v. *Yuginovich*, 256 U. S. 451, that the Revenue Laws pertaining to liquor fell before the Prohibition Act.

In 1921, shortly following that decision, Congress passed the so-called Willis-Campbell Act (c. 134, 42 Stat. 222, 223) which, it will be noted, is an act supplemental to the National Prohibition Act, in terms as follows:

> "Effect on Existing Legislature. All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor and all penalties for violation of such laws that were in force on October 28, 1919, shall be and continue in force as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of this title; but if any act is a violation of any such laws and also of this title, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other" (Section 5).

The situation then is that, not by any force of their own (*United States* v. *Yuginovich, supra*), but rather by virtue of the section of the Willis-Campbell Act just quoted, the penalty provisions, such as Sections 3061-2 of the Customs Laws and Section 3450 of the Internal Revenue Laws, in force when the Prohibition Law was enacted, were con-

tinued in force, but only if and to the extent that they are not in conflict with the penalty or forfeiture provisions of the Prohibition Act. The question of the inconsistency of the two sets of penalty or forfeiture provisions rests clearly on the purpose of Congress as reflected in the Willis-Campbell Act. That statute is the connecting link provided by Congress and throws light, for example, on such portion of the Tariff Law subsequently passed by Congress as pertains to intoxicating beverages.

It seems clear, in the light of the scope and terms of the National Prohibition Act passed two years before for the suppression of liquor traffic, that both the purpose and effect of the Willis-Campbell Act were the consolidation, into the National Prohibition Law and system, of the other laws, as far as they related to the specific practices or acts condemned by the Prohibition Act. To that extent, the other laws were made subsidiary to national prohibition and became members of the system created to render unlawful the manufacture, transportation or importation of liquor.

That this is the proper interpretation of Congressional intent is strengthened by the fact that the Willis-Campbell Act is supplemental to the National Prohibition Law, and that in it Congress was careful to limit the revival of the other laws to those not in conflict with the Prohibition Laws. Having forbidden, among other things, the transportation and importation of liquor and set up the machinery, in transportation cases, under Section 26 for the forfeiture of vehicles, but with the expressed policy of recognizing the interests of innocent lienors in such vehicles, Congress, in the important exception made in the Willis-Campbell Act, gave expression to its purpose, that in the field of liquor traffic the provisions of the National Prohibition Law shall be not only dominant, but controlling. The Willis-Campbell Act serves to add the other laws to the National Prohibition Act to enlarge its authority and opportunities for accomplishing its object. Its plain language is directed toward the violation of the liquor laws. Such is the effect of the decision in the *Richbourg* case with respect to Section 3450,

and, in view of the scope of the Prohibition Act, there is no reason for any distinction regarding Sections 3061-2 of the Tariff Laws. On that basis, violations of the Customs Laws, as well as of the Internal Revenue Laws, which consist of importation and transportation of liquor sufficient to invoke the forfeiture provisions of Section 26 of the Prohibition Law, must be dealt with under the latter. In that manner only is it possible to effectuate the obvious purpose of Congress in Section 26 to respect, in relation to vehicles such as automobiles used in the transportation of liquor contrary to the law, the interests of innocent lienors under conditional sales of automobiles for example, in recognition of the commercial existence and growth of those interests which were not a factor at the time of adoption of the other two forfeiture sections, and of the fact that there is no violation of the liquor laws by the innocent lienors and that therefore the penalty should not be directed against them.

If this construction is sound to this point, it is not an answer to it that either under the decision of this Court in *United States* v. *Stafoff*, 260 U. S. 477, or under the pertinent schedule of subsequent Tariff Acts, liquors are taxable. In the *Stafoff* case, the Willis-Campbell Act was held by this Court to overthrow the effect of its decision, in the *Yuginovich* case, on the fate of taxes on intoxicating liquor under the old laws and to revive them, and in the Tariff Act of 1922 Congress retained the schedule on liquors. Not only, however, did Congress clearly manifest in Section 5 of the Willis-Campbell Act its differentiation between the revival of the old taxes on intoxicating liquor and the penalties which might conflict with those provided in the Prohibition Act, but there is also no necessary relation between the continuation of the old taxes and the purpose of limiting the forfeiture procedure and rights, as applied to vehicles used in transportation, to Section 26. With the object of increasing the burden of persons violating the Customs Law by transporting liquor across the border, as well as subjecting the vehicle used in that act to for-

feiture for the violation of the Prohibition Law, Congress may be said to have retained the duty on the liquors specifically prohibited from importation under the Prohibition Act. In that connection, there is some significance in the provision of the Tariff Act that it should apply to articles forbidden to be imported into the United States, indicating Congress' mindfulness of the scope of the Prohibition Law in that respect. It will be observed also that the result of the revival of the old taxes on liquor by the Willis-Campbell Act, under the Stafoff decision, did not influence this Court's decision in the *Richbourg* case with respect to the control of the forfeiture provisions under Section 26 over those under Section 3450.

Nor is it an answer that Congress failed to repeal Sections 3061-2 under the Tariff Laws. There is also no distinction at this point between Section 3450 and Sections 3061-2, because in the *Richbourg* case it was similarly a fact that Congress failed to repeal Section 3450. The failure of repeal does not signify that Congress intended those sections to have coordinate authority with Section 26. It is more consistent with the language of the latter and of the Willis-Campbell Act, that Congress believed it to cover all cases of transportation, including importation, and that Congress believed the language of the Willis-Campbell Act bearing on liquor laws inconsistent with the provisions of the Prohibition Act adequate to obligate Government officials to prosecute their libels under Section 26 in liquor transportation cases, and left Sections 3061-2 standing for application to other violations of the Customs Law.

The construction and conclusion here urged have been accepted as the more reasonable ones in several Federal cases.

United States v. *Ford Coupe Automobile,* 43 Fed. (2d) 212;

United States v. *One Studebaker,* 45 Fed. (2d) 430;

The Sebastopol, 47 Fed. (2d) 336;

Colon v. *Hanlon,* 50 Fed. (2d) 353.

The situation in several cases in which the Government was permitted to proceed under Sections 3061-2 was that there was no evidence of transportation.

United States v. *Cahill*, 13 Fed. (2d) 83;
United States v. *One Reo Coupe Automobile*, 46 Fed. (2d) 815.

Dated, New York, N. Y., April 1, 1932.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 574

GENERAL MOTORS ACCEPTANCE CORPORATION ET AL.

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court did not render an opinion in any of the four cases here involved. The certificate of the Circuit Court of Appeals is not reported.

JURISDICTION

The certificate of the Circuit Court of Appeals was filed in this Court on December 14, 1931. (R. 5.) The jurisdiction of this Court rests upon Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS CERTIFIED

The questions certified are as follows (R. 3–4):

1. Does Section 26 of Title II of the National Prohibition Act repeal by implication and render inoperative in liquor importation and transportation cases the forfeiture provisions of the customs laws, in so far as offending vehicles are concerned? Or, putting the question in another form:

2. Do the mandatory provisions of Section 26 of the National Prohibition Act apply when the automobile has been seized while in the act of transporting intoxicating liquor across the border and some distance into the United States?

3. May the government, in such a case, ignore such mandatory provisions, arrest the driver, and elect to forfeit the automobile under the customs laws?

4. Is the record in the criminal case wherein the driver pleaded guilty of violating the customs laws (Tariff Act of 1930) admissible in the separate forfeiture proceedings wherein the intervener is the only party appearing, for the purpose of showing unlawful importation by the automobile, or for any other purpose?

STATEMENT

The facts of the four cases here involved are set forth in the certificate as follows (R. 1–3):

The record presents four consolidated automobile forfeiture cases in which the same disputed legal questions are involved.

On four different dates during July and August, 1930, the four automobiles whose forfeiture is in issue were seized at ports of entry on the Mexican border, each vehicle having liquor concealed therein. Three of the cars were seized at San Ysidro, California, and the fourth at Calexico, California. Each car was observed crossing the international boundary line from Mexico and traveling some distance thereafter in the United States, and in each instance the concealed liquor was discovered at an official stopping place of the United States Customs Service. The seizures were effected by customs officers.

All four drivers of the cars were arrested. Each was charged with violations of the Tariff Act of 1930; namely, unlawfully importing liquor into the United States, and knowingly concealing and facilitating the transportation of such liquor. Each indictment alleged failure to obtain a permit, failure to pay duties, and failure to make entry at the custom house. The four defendants entered pleas of guilty to the first count, which charged importation, and were sentenced by the court. In each case, the remaining count was dismissed.

A libel of information *in rem* was filed by the United States Attorney against each automobile, claiming its forfeiture under the provisions of Sections 3061 and 3062 of the Revised Statutes. (19 U. S. C. 482 and 483.) In three of the cases the General Motors Acceptance Corporation intervened

as owner of the attached automobiles, and in the other case the vehicle was claimed by the Howard Automobile Company. All the interveners set up proof of ownership, averred that they were innocent of any illegal acts in which the vehicles may have been involved, and prayed the court to dismiss the libels, contending that the Government's sole remedy was under Section 26, Title II, of the National Prohibition Act. (27 U. S. C. 40.)

In each case, it was stipulated that the liquor alleged to have been found in the automobile was intoxicating in fact and fit for beverage purposes. It was further stipulated, subject to the objection by the libelant that such a purported defense was incompetent, irrelevant, and immaterial, that neither the seller nor the intervener had any notice of the illegal use, or intended illegal use, of the automobile.

The Government offered in evidence at the forfeiture proceedings the judgment roll, consisting of the indictment and sentence, in the criminal cases, at which, as stated above, pleas of guilty had been entered. The intervener in each case objected to the introduction of this judgment roll, on the ground that it was incompetent, irrelevant, and immaterial; that no proper foundation had been laid; that the roll was not binding upon the intervener; and that it did not show that the intervener was a party to the criminal action or had notice of it. The objections were overruled and the records were

admitted in evidence, to which the respective interveners duly excepted.

Testimony of customs officers showed that the four automobiles were driven across the international boundary some distance into the United States before being searched and seized.

The District Court entered decrees of forfeiture in all four cases, finding that each automobile "was engaged in smuggling dutiable merchandise into the United States in violation of the customs laws thereof."

STATUTES INVOLVED

These are set forth in the Appendix, *infra*, pp. 35–42.

SUMMARY OF ARGUMENT

Section 26, Title II, of the National Prohibition Act does not repeal the forfeiture provisions of Sections 3061–3062 of the Revised Statutes in cases involving both the unlawful importation and transportation of intoxicating liquor.

The enforcement provisions of the customs laws provide a flexible and comprehensive system of laws well adapted to govern the importation of merchandise of all kinds. The Tariff Acts of 1922 and 1930, passed subsequently to the enactment of the National Prohibition Act, define the word "merchandise" as including commodities the importation of which is prohibited. Both Acts provide for duties on intoxicating liquors, and the penalty and forfeiture provisions of both unquestionably apply

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to intoxicating liquor, as well as to any other merchandise the importation of which is forbidden.

On the other hand, in the National Prohibition Act Congress did not provide completely or comprehensively for the control of unlawful importations of liquor. Thus, that Act contains no specific provision for the forfeiture of vehicles used in the unlawful *importation* of intoxicating liquors.

Implied repeal is a matter of intent. By making adequate and inclusive provisions in the customs laws for the enforcement of the law against unlawful importation of intoxicating liquors, by failing to provide complete control of liquor importations in the National Prohibition Act, and by expanding the facilities of the customs and coast guard services in order to handle liquor importation cases, Congress has indicated an intent that the forfeiture provisions of the customs laws are to be available in cases involving unlawful liquor importations.

The decision of this Court in *Richbourg Motor Company* v. *United States*, 281 U. S. 528, does not govern the instant case. There the Court was dealing with the forfeiture provisions of an internal revenue law which had originally been enacted with reference to a lawful business which subsequently became unlawful, and the Court held that the mandatory provisions of Section 26 of the National Prohibition Act impliedly repealed the forfeiture

provisions of the internal revenue law. The instant case involves the forfeiture provisions of the customs laws which expressly applied to the importation of merchandise the importation of which was forbidden. The forfeiture provisions of these laws are as mandatory as those in Section 26. If they are in conflict the former must be regarded as controlling in view of legislative enactments since the National Prohibition Act.

The substance of the offense involved in the *Richbourg case* was the unlawful transportation of intoxicating liquors. The substance of the offense involved in the instant case is the unlawful importation of the intoxicating liquors, the transportation being only incidental to the importation.

The decision of the Court in the *Richbourg case* may have been influenced by the fact that under Section 26 of the National Prohibition Act the rights of innocent owners and lienors were protected, whereas such rights were not protected under the provision of the internal revenue law in question. The customs laws involved in the instant case protect the rights of innocent owners and lienors by an administrative adjudication which is in substance equivalent to the protection furnished innocent owners under Section 26.

The same reasoning which would sustain a holding that the forfeiture provisions of Sections 3061–3062 of the Revised Statutes are impliedly repealed

by Section 26 would probably apply to cases where other forfeiture provisions of the customs laws are involved, and likewise to forfeiture provisions in the navigation laws. We submit that Congress did not intend Section 26 to supersede all such statutory provisions wherever the offense involved happened to occur simultaneously or in conjunction with an illegal transportation of intoxicating liquor. Moreover, such a holding would result in serious administrative difficulties.

No sufficient basis exist in the facts stated which would either require or permit an answer to the fourth question certified.

ARGUMENT

Points I and II of this brief relate to the first three questions certified by the Circuit Court of Appeals, which present substantially the same issue. Point III relates to the fourth question certified by the Circuit Court of Appeals, which involves an unrelated issue.

I

CONGRESS HAS MANIFESTED A CLEAR INTENTION THAT THE FORFEITURE PROVISION OF THE CUSTOMS LAWS SHOULD BE APPLICABLE TO VEHICLES SEIZED BY CUSTOMS OFFICERS IN THE ACT OF TRANSPORTING INTOXICATING LIQUOR ACROSS THE INTERNATIONAL BORDER INTO THE UNITED STATES

The vehicles involved in the instant case were seized by customs officers at official stopping places of the customs service while in the acts of both *importing* and *transporting* intoxicating liquor. Their forfeiture was sought under Sections 3061 and 3062 of the Revised Statutes (pp. 35–36, *infra*) which provide for the forfeiture of all vehicles by which merchandise shall have been introduced into the United States contrary to law. Concededly the facts bring the seized vehicles within the forfeiture provisions of Sections 3061 and 3062 unless the United States is precluded from proceeding under such sections by reason of Section 26, Title II, of the National Prohibition Act (pp. 37–38, *infra*), which provides for the forfeiture of vehicles seized while *transporting* intoxicating liquor in violation of the law.

Whether the forfeiture provisions of Sections 3061–3062 were superseded by Section 26 of the National Prohibition Act and, if so, whether they still remain superseded, are, of course, matters of legislative intent. Many decisions of this Court establish that repeal of statutes by implication is not

favored. Of course when a later Act covers the whole subject of an earlier one and shows plainly that it was intended as a substitute for the first, it will operate as a repeal. *King* v. *Cornell,* 106 U. S. 395 But where an affirmative statute contains no expression of a purpose to repeal a prior law, it will not have the effect of repeal, unless the two are in irreconcilable conflict and unless the later one covers the whole ground and is plainly intended as a substitute for the former. The courts must, if possible, give effect to both laws. *Wood* v. *United States,* 16 Pet. 342; *United States* v. *Tynen,* 11 Wall. 88; *Henderson's Tobacco,* 11 Wall. ~~Wenie~~ 652; *Red Rock* v. *Henry,* 106 U. S. 596; *Frost* v. *Wenie,* 157 U. S. 46; *United States* v. *Greathouse,* 166 U. S. 601; *United States* v. *Lee Yen Tai,* 185 U. S. 213; *Maul* v. *United States,* 274 U. S. 501.

Light as to the legislative intent with respect to the applicability of the customs laws to the importation of intoxicating liquors is found in a consideration of the scope of the customs laws and of the National Prohibition Act.

From the beginning of the Federal Government the customs laws have provided a complete system for regulating the importation into the United States of merchandise of every description. The fifth statute enacted by the First Congress at its first session instituted the administrative customs system. Act of July 31, 1789, c. 5, 1 Stat. 29. This law was succeeded by the Act of August 4, 1790, c.

35, 1 Stat. 145, and then by the Act of March 2, 1799, c. 22, 1 Stat. 627, which remained in force for many years. In recent years the administrative provisions of the customs laws have been restated in the Tariff Act of 1922 and the Tariff Act of 1930, but it is noteworthy that few material changes have been made. In the main the system is one that has been uniform and continuous. It is flexible in its application, well suited to control the importation of merchandise of every description, and adaptable to the laws relating to specific kinds of merchandise which may at the time be in effect.

One change should be noted. The earliest acts were applicable almost entirely to vessels and to merchandise imported therein. Later it became necessary to broaden the administrative provisions so as to include vehicles, the most noteworthy amplifying statute being the Act of July 18, 1866, c. 201, 14 Stat. 178, Section 3 of which contained the vehicle forfeiting provisions which afterwards became Sections 3061–3062 of the Revised Statutes and which are still in effect.[1]

[1] It does not appear why these sections were not reenacted in the Tariff Act of 1922 or the Tariff Act of 1930, when other sections of the Revised Statutes were so reenacted. It can not be disputed, however, that they continued in effect. It is significant that the Tariff Act of 1922, which was subsequent to the National Prohibition Act, did not repeal these sections although it expressly repealed many sections of the Revised Statutes immediately anterior and posterior to Sections 3061–3062.

The purpose of the administrative customs laws has continuously been not only to insure the collection of revenue but also to limit or prevent entirely the introduction of certain merchandise into the United States. In fact, the collection of revenue need not be an element in sound customs administration, and it is not a new thing to have customs regulations apply to the importation of merchandise absolutely prohibited.[2]

When the Eighteenth Amendment became effective some question arose as to whether intoxicating liquor came within the general term "merchandise," as used in the customs enforcement laws. Thereupon Congress, to remove any doubt, declared in both the Tariffs Acts of 1922 and 1930 (Section 401 of each Act) that—

> The word "merchandise" means goods, wares, and chattels of every description and *includes merchandise the importation of which is prohibited.* (Italics ours.)

But this definition was only declaratory of what the law had always been. *Harford* v. *United States,* 8 Cranch 109; *United States* v. *Sischo,* 262 U. S. 165; *Bookbinder* v. *United States,* 287 Fed. 790 (C. C. A. 3d), certiorari denied, 262 U. S. 748.

Thus, when the Eighteenth Amendment became a part of the Constitution and the National Prohibition Act became law, there existed a well-settled

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[2] See, for example, Sections 9, 12, and 14 of the Tariff Act of 1909, 36 Stat. 11, 86, and Sections G, H, and I of Section IV of the Tariff Act of 1913, 38 Stat. 114, 195.

body of customs law which had been worked out by experience and which was well adapted to control the importation of merchandise generally, including prohibited importations. That Congress did not intend the provisions of the customs laws, so far as they are applicable to intoxicating liquors, to be superseded by the National Prohibition Act, is indicated by the fact that in that Act Congress did not completely cover the control of liquor importations.

The Eighteenth Amendment prohibited—

> the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States * * * for beverage purposes * * *.

A distinction was made in terms between *transportation of intoxicating liquors within* and *the importation thereof into* the United States. In the National Prohibition Act the distinction between transportation and importation was continued, Section 3 of that Act making criminal the following acts with respect to intoxicating liquors: (1) Manufacturing, (2) selling, (3) bartering, (4) transporting, (5) importing, (6) exporting, (7) delivering, (8) furnishing, and (9) possessing.[4]

But while the National Prohibition Act makes it an offense to *import* as well as to *transport* liquors, its only forfeiture provision applying to vehicles and vessels (Section 26) is effective only in

[4] See also the Act of March 2, 1929, c. 473, 45 Stat. 1446.

transportation cases. At no place in the Act is there declared a forfeiture of vessels or vehicles used in *importation.* Furthermore, the Act's effect *in rem* in transportation cases is much restricted in scope and applies only where some person is arrested in the commission of the offense. In reality the action under Section 26 against a vessel or vehicle is not an *in rem* action at all. Forfeiture does not follow proof of an offense *in rem.* It follows as one of the consequences of a conviction *in personam.*

It will be observed further that none of the provisions of the National Prohibition Act which impose a forfeiture on contraband liquors in specific terms applies to liquors which have been *imported.* This is true both of Section 25 and Section 26, although those sections do declare the forfeiture of liquors generally which are illegally possessed or transported.

It may be argued, of course, that transportation includes importation. That is true only in a limited sense. If transportation and importation are identical or if one includes the other, no purpose was served by making them separate criminal offenses in Section 3 of the Act, or distinguishing between them in the Eighteenth Amendment.

Our conclusion is that the National Prohibition Act falls far short of dealing comprehensively and exclusively with the unlawful importation of intoxicating liquor, particularly in its *in rem* phases.

There are other evidences of the congressional intent that the customs laws are to be available for use in the field of liquor importation.

Imported liquors were subject to duty when the National Prohibition Act became effective (Schedule H, Tariff Act of 1913; 38 Stat. 135) and the duty was not eliminated by that event. *United States* v. *Bookbinder,* 281 Fed. 206 (E. D. Pa.). Such duties were reenacted in Schedule 8 of the Tariff Act of 1922 (42 Stat. 897) and in Schedule 8 of the Tariff Act of 1930 (46 Stat. 639). Congress was careful to state, however, that such duties should not be construed as in any manner limiting or restricting the National Prohibition Act. (Par. 801, Schedule 8, Tariff Act of 1922; Par. 801 (a), Schedule 8, Tariff Act of 1930. Moreover, it is significant, we believe, that in both of the latest Tariff Acts (Par. 813, Schedule 8, Tariff Act of 1922, 42 Stat. 898; Par. 814, Schedule 8, Tariff Act of 1930, 46 Stat. 640) Congress provided that—

> any such wines, spirits, or other liquors or articles imported or brought into the United States without a permit shall be seized and forfeited in the same manner as for other violations of the customs laws.

Such language is not consistent with an understanding on the part of Congress that the National Prohibition Act was complete and adequate in itself or that it was intended to provide alone the enforcement of the law against liquor smuggling.

If Congress considered that the National Prohibition Act alone was adequate to enforce the con-

stitutional prohibition against the importation of beverage liquor, then there is no reasonable explanation for the increased appropriations that have been made since the Eighteenth Amendment to provide for the Customs and Coast Guard services.[4] The appropriation Acts set forth in the footnote and others which might be cited furnish contradiction of any contention that Congress intended the National Prohibition Act to cover the entire field of liquor law enforcement. In this connection it should be borne in mind that Coast Guard officers are officers of the Customs (*Maul* v. *United States*, 274 U. S. 501), and neither they nor the regular customs officers have express authority to act as prohibition agents.

Of further significance is the Act of March 3, 1927, c. 348, 44 Stat. 1381, whereby Congress created in the Treasury Department a Bureau of Customs and a Bureau of Prohibition. Section 2 (c)

[4] The following table shows the regular annual appropriations made for these two services for the years 1920 to 1932, inclusive:

Fiscal year	Coast Guard (excluding headquarters expenses)	Bureau of Customs	Statute references
1920	$7,049,000.00	$10,085,000.00	41 Stat. 171, 174.
1921	9,499,940.00	11,457,000.00	41 Stat. 880, 883.
1922	10,171,857.80	11,435,000.00	41 Stat. 1373, 1376.
1923	9,756,688.50	11,528,500.00	42 Stat. 378, 373.
1924	11,328,100.60	12,318,500.00	42 Stat. 1099, 1094.
1925	10,516,944.00	13,874,140.00	43 Stat. 73, 69.
1926	20,377,835.00	16,656,200.00	43 Stat. 772, 769.
1927	24,083,140.00	17,948,000.00	44 Stat. 145, 141.
1928	29,340,000.00	17,950,000.00	44 Stat. 1036, 1032.
1929	28,640,570.00	19,180,000.00	45 Stat. 173, 167.
1930	29,372,616.00	21,685,000.00	45 Stat. 1037, 1033.
1931	31,781,156.00	22,952,160.00	46 Stat. 345, 339.
1932	33,606,422.00	26,963,600.00	46 Stat. 1226, 1221.

Attention is called also to the First Deficiency Act of 1924 (43 Stat. 33, 50) wherein Congress authorized the expendi-

of that Act (p. 42, *infra*) relieves customs officers of any duty to execute the provisions of the National Prohibition Act. Presumably Congress must have assumed that such officers were charged with the duty of preventing liquor smuggling under the customs laws, because it has never equipped prohibition agents to operate in the customs field.

Accordingly, we submit that the customs laws are not inconsistent with the National Prohibition Act, and that it is the clear intent of Congress that they should be available in their own field where applicable for the control of liquor importation.

II

THE RICHBOURG DECISION DOES NOT SUSTAIN THE CONTENTION THAT SECTION 26, TITLE II, OF THE NATIONAL PROHIBITION ACT REPEALS BY IMPLICATION THE FORFEITURE PROVISIONS OF THE CUSTOMS LAWS WITH RESPECT TO VEHICLES SEIZED IN LIQUOR IMPORTATION AND TRANSPORTATION CASES

The intervener-appellant contends that, not by any force of their own but by reason of Section 5 of the Willis-Campbell Act, Sections 3061–3062 of the

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ture of $12,194,900.00 for additional motor boats and equipment for the Coast Guard; also to the Act of April 21, 1924 (43 Stat. 105), whereby the Coast Guard personnel was temporarily increased. Committee reports and hearings show clearly that liquor smuggling was the basis of both. (See House Report No. 228, 68th Cong., 1st Sess.; Hearing before Committee on Interstate and Foreign Commerce, 68th Cong., 1st Sess., on H. R. 6815; Senate Report No. 293, 68th Cong., 1st Sess.) See also the Act of June 10, 1926 (44 Stat. 725), whereby Congress authorized ten new cutters for the Coast Guard, to cost nine million dollars. Committee reports and hearings on this bill likewise show that the expansion of Coast Guard facilities was necessitated by liquor smuggling.

Revised Statutes, in force when the National Prohibition Act was enacted, were continued in force, but only to the extent that such sections were not in direct conflict with the National Prohibition Act; that by Section 26 of the last named Act Congress has provided the complete machinery for the forfeiture of all vehicles seized in transporting intoxicating liquor; that Sections 3061–3062 are directly in conflict with Section 26 whenever a vehicle is seized in the act of *importing* intoxicating liquor if it is at the same time engaged in *transporting* intoxicating liquor, and that to that extent Sections 3061–3062 are superseded by Section 26.

It is contended that the situation in the instant case is in substance the same as that before this Court in *Richbourg Motor Co.* v. *United States,* 281 U. S. 528. That case held that where a person discovered in the act of transporting liquor unlawfully has been arrested and the transporting vehicle seized under Section 26, proceedings to forfeit the vehicle must be taken under that section, and may not be taken under Section 3450 of the Revised Statutes, which provides for the forfeiture of vehicles used in the removal or concealment of any commodity with intent to deprive the United States of any tax upon it.

Prior to the *Richbourg case* the lower courts quite generally applied the customs laws to forfeitures of vehicles for unlawful importation of liquor. Since that decision there has been a wide

divergence of opinion in cases involving the forfeiture of vessels or vehicles. Cases have arisen not only under the customs laws but also under the navigation laws. The decisions of the lower courts can not be reconciled.[5] Without attempting to discuss in detail the numerous cases, we submit that those cases present the better reasoned view which hold that the forfeiture provisions of the customs and navigation laws are still applicable in cases involving the unlawful importation of intoxicating liquors, notwithstanding the fact that the offending vessel or vehicle is engaged in transportation of intoxicating liquor at the time of seizure.[6]

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[5] It has been the purpose of the Government to bring before this Court as many different phases of the problem as possible. This accounts for the Government's petitions for writs of certiorari in *United States* v. *Commercial Credit Co.*, *United States* v. *Two-masted Auxiliary Schooner Ruth Mildred, etc.*, and *United States* v. *Wilfred Corriveau*, respectively, Nos. 734, 795, and 825, the present term. It also explains the Government's failure to oppose the petition in *General Import and Export Co., Inc.*, v. *United States*, No. 811, the present term.

[6] *The Pilot*, 43 F. (2d) 491 (C. C. A. 4th); *United States* v. *One Reo Coupe Automobile*, 46 F. (2d) 815 (D. Mass.); *United States* v. *One Fargo Truck*, 46 F. (2d) 171 (S. D. Tex.), reversed, 53 F. (2d) 977 (C. C. A. 5th); *The Daisy T.*, 48 F. (2d) 370 (D. Del.); *United States* v. *James Hayes et al.*, 52 F. (2d) 977 (E. D. N. Y.); *The Sebastopol*, decided March 9, 1932 (C. C. A. 2d), now pending on certiorari, No. 811, October Term, 1931, *sub nomine*, *General Import and Export Co.* v. *United States*. See also *The Motor Boat—The Thorndyke*, 53 F. (2d) 239 (D. N. J.); *Corriveau* v. *United States*, 53 F. (2d) 735 (C. C. A. 1st), now pending on certiorari, No. 825, October Term, 1931; *Maniscalco* v. *United States*, 53 F. (2d) 737 (C. C. A. 1st); *United States* v.

While the *Richbourg case* holds that where transportation is involved and the driver is arrested the forfeiture provisions of Section 3450 of the Revised Statutes are impliedly repealed by Section 26 of the National Prohibition Act, that decision does not warrant the conclusion that the forfeiture provisions of Sections 3061–3062 have been superseded by Section 26. The United States contends that the situation before the court in the *Richbourg case* is not fairly comparable to the situation here presented; that the provisions of the customs laws here involved are just as mandatory as those in Section 26 of the National Prohibition Act, and that if the two laws are to be regarded as in conflict, legislative action since the enactment of the National Prohibition Act establishes the legislative intent that the customs laws should continue to be available in liquor importation cases.

American Motor Boat K–1231, 54 F. (2d) 502 (C. C. A. 2nd); *The Standard Coaster*, 55 F. (2d) 306 (E. D. N. Y.).

The opposite conclusion has been reached in the following cases: *United States* v. *Ford Coupe Automobile*, 43 F. (2d) 212 (S. D. Fla.); *United States* v. *One Studebaker Automobile*, 45 F. (2d) 430 (D. Ariz.); *The Ruth Mildred*, 47 F. (2d) 336 (S. D. N. Y.), affirmed March 9, 1931 (C. C. A. 2d), now pending on certiorari, No. 795, October Term, 1931, *sub nomine*, *United States* v. *Two-masted Auxiliary Schooner Ruth Mildred, etc.*; *Colon* v. *Hanlon*, 50 F. (2d) 353 (C. C. A. 1st); *Commercial Credit Co.* v. *United States*, 53 F. (2d) 977 (C. C. A. 5th), now pending on certiorari, No. 734, October Term, 1931; *United States* v. *One Buick Coupe*, 54 F. (2d) 800 (S. D. Fla.); *United States* v. *Wilfred Corriveau*, decided February 25, 1932 (C. C. A. 1st), pending on petition for certiorari, No. 825, October Term, 1931.

In the first place there is no essential similarity between the relationship of Section 3450 of the Revised Statutes to Section 26 of the National Prohibition Act and the relationship of Sections 3061–3062 of the Revised Statutes to Section 26.

Section 35 of the National Prohibition Act provides in part:

> All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency, and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws.

Shortly after the National Prohibition Act became effective the Government, relying upon Section 35, attempted to prosecute certain persons for various alleged violations of the internal revenue statutes. The defendants in those cases contended that the statutes were inconsistent with and therefore impliedly repealed by the National Prohibition Act, and this contention was sustained in *United States* v. *Yuginovich*, 256 U. S. 450. Thereafter Congress enacted the Act of November 23, 1921, c. 134, 42 Stat. 222, 223, the Willis-Campbell Act, Section 5 of which provided in part:

> That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions

> of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; * * *.

Thereafter, in *United States* v. *Stafoff*, 260 U. S. 477, it was held that the statutes which had been held impliedly repealed in the *Yuginovich case* were enforceable since they were not in direct conflict with the National Prohibition Act.

The *Yuginovich* decision has been cited by some courts as authority for sustaining the assertion of conflict between the National Prohibition Act and the customs laws, but we believe it is not in point. As this Court pointed out in *United States* v. *Sischo*, 262 U. S. 165, 167:

> There is less contradiction between the requirement of the manifest and the prohibition of the import than there is between such a prohibition and a tax.

The internal revenue laws construed in the *Yuginovich case* originally regulated the manufacture of liquor as a lawful enterprise, and when such manufacture for beverage purposes became unlawful by constitutional mandate it was held inconsistent to apply to such an unlawful enterprise the prior regulations pertaining to a lawful business. On the other hand, as has already been pointed out, the customs enforcement laws have always been general and flexible in their application. They are adaptable to the importation of all classes of merchandise whether at the time conditionally admissible or *absolutely prohibited.*

There are other distinctions between the *Richbourg case* and the instant case. In construing Section 26, Title II, of the National Prohibition Act, in the *Richbourg case* this Court pointed out the mandatory wording of the section and concluded that that which was mandatory in form was also mandatory in fact.

The instant case involves customs laws which were and are no less mandatory than the National Prohibition Act in so far as arrests, seizures, prosecutions of offenses, and forfeitures are concerned. The mandatory duty placed upon officers of the customs to enforce the forfeitures declared by Sections 3061–3062 of the Revised Statutes is clearly indicated by Sections 602–604 (pp. 39–40, *infra*) of the Tariff Act of 1922.[1]

Section 602 provides that it shall be the duty of any officer authorized to make seizures of merchandise for violation of the customs laws to report every such seizure immediately to the collector of the district in which the violation occurred and to turn over to such collector any vessel, vehicle, or merchandise seized by him. Section 603 provides that whenever a seizure of merchandise has been made for violation of the customs laws it shall be the duty of the collector to report the same to the Solicitor of the Treasury and to the United States

[1] These sections were substantially a reenactment of prior laws in force when the National Prohibition Act was enacted. See R. S. Sections 3083–3087 and Section 15, Act of June 22, 1874, c. 391, 18 Stat. 189.

Attorney. Section 604 directs that it shall be the duty of every United States Attorney immediately to inquire into the facts of cases reported by collectors and, if it appears probable that any fine or forfeiture has been incurred, forthwith to cause the proper proceedings to be commenced for the recovery of such fine or forfeiture.[8]

The forfeiture provisions of the customs law being no less mandatory than those of Section 26, which shall prevail in a situation where each might be applicable were it not for the other? Ordinarily it is the later of two inconsistent statutes which prevails. But while Section 26 of the National Prohibition Act was enacted subsequently to Sections 3061–3062, the mandatory provisions of Sections 602–604 of the Tariff Act of 1922 and similar provisions of the Tariff Act of 1930[9] were enacted after the National Prohibition Act and the Willis-Campbell Act. Moreover, both of the subsequent Tariff Acts of 1922 (42 Stat. 897, 990) and 1930 (46 Stat. 590, 639, 763) contain a provision that "all laws and parts of laws inconsistent with the provisions of this Act are hereby repealed."

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[8] See also Section 616 of the Tariff Act of 1922 which makes it a felony for any officer of the United States, except the Secretary of the Treasury, to relieve or attempt to relieve any person, vessel or vehicle, or merchandise from any fine or forfeiture incurred under the customs laws. (P. 41, *infra.*)

[9] See Sections 602–604 of the Tariff Act of 1930.

Accordingly, if there is a direct conflict between Section 26 and the forfeiture provisions of the customs laws, the latter, being the later expression of Congress should prevail. This conclusion would seem to be squarely sustained by the decision of this Court in *Callahan* v. *United States,* No. 576, present term, decided April 11, 1932.

Furthermore, as pointed out above (pp. 8–17, *supra*), Congress has in other ways since the enactment of the Prohibition Act manifested its intention that the customs laws shall be applicable to importations of intoxicating liquors.

A further important distinction exists between the instant case and the *Richbourg case.* In the latter case there was no evidence that the intoxicating liquors found in the vehicles had been unlawfully introduced into the United States, nor was there evidence of removal, deposit, or concealment with intent to defraud the United States of a tax upon the merchandise *except as such removal or concealment is necessarily involved in any unlawful transportation of intoxicating liquors.* The Court stated that the question presented was whether "proceedings for the forfeiture of a vehicle seized under Section 26 of the National Prohibition Act, as one used for unlawful transportation of intoxicating liquor, but where there has been no prosecution for that offense, must be had under that section,

* * *." It is our view that this Court in the *Richbourg case was concerned with the substance of the offense that had been committed with the use of the automobile,* and that its opinion proceeds upon the assumption that the vehicle in question was seized under the National Prohibition Act as one used for the unlawful transportation of intoxicating liquors.

In the instant case the substance of the offense was the unlawful importation and the transportation was merely incidental. Moreover, the character of the merchandise was wholly immaterial so long as it was merchandise which was introduced into the United States contrary to law. The case at bar involves automobiles seized by customs officers, charged with the duty of preventing smuggling of merchandise into the United States, at ports of entry on the Mexican border. Each car was actually observed crossing the international boundary line and in each concealed liquor was discovered at an official stopping place of the customs service. The driver of each car was charged with violations of the Tariff Act of 1930 and each defendant pleaded guilty to the count of the indictment which charged importation. Forfeiture of the automobiles was sought under the provisions of the customs laws and in each case the District Court found that the vehicle "was engaged in smuggling dutiable merchandise into the United States in violation of the customs laws thereof." That the ele-

ment of transportation was present is conceded but, as pointed out in *United States* v. *One Reo Coupé Automobile,* 46 F. (2d) 815, 818 (Mass.)—

> It is impossible to conceive of any case of smuggling where the element of transportation would not have been at some time present, but here the substantive crime was a violation of the customs laws * * *.

See *United States* v. *One Buick Coupe,* 54 F. (2d) 800 (S. D. Fla.).

In the *Richbourg case* the Court may have been influenced by the fact that under Section 26 of the National Prohibition Act the rights of innocent owners and lienors were protected while such rights were not protected under Section 3450. The same consideration seems to have influenced the courts which have found a direct conflict between the forfeiture provisions of Section 26 and Sections 3061–3062. But although the rights of innocent owners and lienors are not conserved under the customs laws by *judicial* determination, it has been the policy of Congress from the beginning of customs legislation to protect innocent interests by *administrative* determination. *The Pilot,* 43 F. (2d) 491 (C. C. A. 4th), *supra.*

At the time the National Prohibition Act became effective the authority of the Secretary of the Treasury to remit forfeitures and penalties incurred under the customs laws was contained in

Section 3078 of the Revised Statutes and Sections 17, 18 and 20 of the Act of June 22; 1874, 18 Stat. 189, 190. These provisions were repealed by the Tariff Act of 1922 and were succeeded by Sections 613 and 618 of that Act (pp. 40, 41, *infra*). Section 618 provides that whenever any person interested in a vessel or vehicle seized for violation of the customs laws files with the Secretary of the Treasury before the sale of such vessel or vehicle a petition for remission of such fine or forfeiture, the Secretary of the Treasury, if he finds that the fine or forfeiture was incurred without wilful negligence and without intention on the part of the petitioner to violate the law, may remit the same upon such terms as he deems reasonable. Section 613 permits any person claiming any interest in a vessel or vehicle forfeited and sold under the customs laws to apply to the Secretary of the Treasury within three months from the date of the sale for a remission of the forfeiture upon a showing that the applicant did not know of the seizure prior to the forfeiture and that the forfeiture was incurred without wilful negligence or intention to defraud on the part of the applicant.

While it may be conceded that the administrative remission of forfeitures under the customs laws is not the exact equivalent of an adjudication by a court, it would seem to be substantially equivalent, since it will be assumed that the executive having full authority to provide relief will exercise his

function in a proper manner. It can not be assumed in forfeiture cases under the customs laws that the rights of innocent claimants can not and will not be preserved. If, as we submit, the rights of innocent claimants are protected by the customs laws substantially as well as under Section 26 of the National Prohibition Act, we see no proper basis for holding that a direct conflict exists because of slightly different consequences of conviction.

Finally there are practical considerations which weigh against the conclusion that Section 26 has superseded the forfeiture provisions of Sections 3061–3062 unless no other reasonable conclusion can be reached.

The same reasoning which is advanced to sustain the assertion of conflict between Section 26 and Sections 3061–3062 would seem to apply, in part, at least, to other forfeiture provisions of the customs laws and to the forfeiture provisions of the navigation laws. (See Sections 453, 460, 585, 586, and 587, respectively, of the Tariff Acts of 1922 and 1930. See also Section 4377 of the Revised Statutes). If all these provisions are held to be superseded by Section 26, and if the National Prohibition Act is to be the sole reliance of the Government for the suppression of liquor smuggling in the transportation cases, the result will be far-reaching along the seacoast and other water frontiers where the Federal police force is composed solely of customs

and coast guard officers. Congress has not seen fit to equip the Bureau of Prohibition to police that field, and moreover, as already pointed out, it has relieved customs officers of any responsibility of enforcing the provisions of the National Prohibition Act.

It is admitted, of course, that a customs or a coast guard officer would come within the term "any officer of the law" as used in Section 26 of the National Prohibition Act (p. 37, *infra*), and that such officer would be obligated to arrest persons found engaged in illegally transporting intoxicating liquor within American waters or near the land boundaries. But to require all subsequent proceedings not only *in personam* but *in rem* to be had under the National Prohibition Act would involve administrative difficulties of an almost insuperable character with the laws in their present state.

To begin with, the Bureau of Prohibition would have no administrative control over customs officers in seeking for illegal transporters of liquor. Moreover, because of the provision contained in Section 2 (c) of the Reorganization Act of 1927 (p. 42, *infra*), the Commissioner of Customs could not direct his subordinates in that activity. This restriction would apply not only along the seacoast but also along the international boundaries.

The custody of seized property would also create a serious administrative problem in liquor importation cases involving an element of transportation. If a customs law or navigation law were not

violated, the Collector of Customs could not be made the custodian of seized vessels or vehicles. (See Sec. 605 of the Tariff Acts of 1922 and 1930, p. 40; *infra.*) Such vessels or vehicles would have to be delivered to prohibition officers. On the other hand, a customs officer seizing illegally imported liquor is bound to treat it as a customs seizure (Tariff Acts of 1922 and 1930—Schedule 8, par. 813) and is required by law to deliver it into the custody of the Collector of Customs.

Other speculative difficulties will occur. In many seizures made in marginal waters the deciding fact determining whether the case should be prosecuted under the customs or the prohibition laws would be the location of the three-mile limit, a line which is often difficult to fix. In *Commercial Credit Co., Inc.* v. *United States, supra,* the Court of Appeals speculated upon a situation where a smuggling vehicle seized by customs officers contained, along with intoxicating liquor, a substantial amount of other contraband merchandise.

We submit that if possible the law should be so construed as to avoid serious administrative difficulties.

III

THE FOURTH QUESTION CERTIFIED SHOULD NOT BE ANSWERED

The fourth question certified is as follows (R. 2):

> Is the record in the criminal case wherein the driver pleaded guilty of violating the

customs laws (Tariff Act of 1930) admissible in the separate forfeiture proceedings wherein the intervener is the only party appearing, for the purpose of showing unlawful importation by the automobile, or for any other purpose?

The necessity for this Court to answer this question does not appear. There is no showing in the certificate that the use of the records in the criminal case was necessary in order to establish the fact that the seized vehicles had been used in the unlawful importation of intoxicating liquor, or to establish any other material fact. In fact, the certificate states that testimony of customs officers showed that the four automobiles which were libeled for forfeiture under Sections 3061–3062 of the Revised Statutes were driven across the international border and further states that they were seized, liquor laden, at ports of entry after they had been observed crossing from Mexico into the United States. It also states that the District Court found that each automobile "was engaged in smuggling dutiable merchandise into the United States." It does not state for what purposes the records of the drivers' pleas of guilty was offered and received in evidence. Whether the drivers had any property interest in the cars at the time they crossed the border or at the time they entered their pleas of guilty does not appear.

For these reasons the fourth question finds no sufficient basis in the facts stated in the certificate

to escape the criticism of "objectionable generality" "admitting of one answer under one set of circumstances and a different answer under another." *White* v. *Johnson*, 282 U. S. 367.

The objection to the fourth question finds support in the state of the authorities. Such records have been received in evidence in forfeiture proceedings in admiralty (*The Potomac*, 8 Wall. 590; *The Kaga Maru*, 18 F. (2d) 295 (W. D. Wash.); *The W. Talbot Dodge*, 15 F. (2d) 459 (S. D. N. Y.)) and by analogy to these cases in forfeiture proceedings where seizure has been made on land (*Dobbins Distillery* v. *United States*, 96 U. S. 395; *United States* v. *One Buick Automobile*, 21 F. (2d) 789 (D. Vt.)). The question in all these cases has, however, turned upon the relation of the person whose admission is offered against the vessel or vehicle sought to be forfeited to the *res*, both at the time of the offense and at the time when the admission was made, whether as owner, master, lessee, or merely as an agent or employee. The certificate in the case does not disclose these relationships. Accordingly the question is merely academic and we submit it should not be answered.

CONCLUSION

We submit that the first and second questions certified by the Circuit Court of Appeals should be answered "*No*," that the third question should be

answered *"Yes,"* and that the fourth question should not be answered.

Respectfully submitted.

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APRIL, 1932.

APPENDIX

STATUTES INVOLVED

Sections 3061 and 3062 of the Revised Statutes (U. S. C., Title 19, Sec. 482–483):

SEC. 3061. Any of the officers or persons authorized to board or search vessels may stop, search, and examine as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial.

SEC. 3062. Every such vehicle and beast, or either, together with teams or other motive power used in conveying, drawing, or

propelling such vehicle or merchandise, and all other appurtenances, including trunks, envelopes, covers, and all means of concealment, and all the equipage, trappings, and other appurtenances of such beast, team, or vehicle, shall be subject to seizure and forfeiture. If any person who may be driving or conducting, or in charge of any such carriage or vehicle or beast, or any person traveling, shall willfully refuse to stop and allow search and examination to be made as herein provided, when required so to do by any authorized person, he shall be punishable by a fine of not more than one thousand dollars, nor less than fifty dollars.

Section 25, Title II, of the National Prohibition Act (Act of October 28, 1919, c. 85, 41 Stat. 305, 315, U. S. C., Title 27, Sec. 39):

SEC. 25. It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating

liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process.

Section 26, Title II, of the National Prohibition Act (Act of October 28, 1919, c. 85, 41 Stat. 305, 315—U. S. C., Title 27, Sec. 40):

When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the

judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

The Tariff Act of 1922, c. 356, 42 Stat. 858, 984, 985, 986, 987:

SEC. 602. *Seizure procedure — Report.* — It shall be the duty of any officer, agent, or other person authorized by law to make seizures of merchandise or baggage subject to seizure for violation of the customs laws, to report every such seizure immediately to the collector for the district in which such violation occurred, and to turn over and deliver to such collector any vessel, vehicle, merchandise, or baggage seized by him, and to report immediately to such collector every violation of the customs laws. (U. S. C., Title 19, Sec. 509.)

SEC. 603. *Same—Facts to report.*—It shall be the duty of the collector whenever a seizure of merchandise has been made for a violation of the customs laws to report the same to the Solicitor of the Treasury, and promptly also to report any such seizure or violation of the customs laws to the United States attorney for the district in which such violation has occurred, or in which such seizure was made, including in such report a statement of all the facts and circumstances of the case within his knowledge, with the names of the witnesses, and citation of the statute or statutes believed to have been violated, and on which reliance may be had for forfeiture or conviction. (U. S. C., Title 19, Sec. 510.)

SEC. 604. *Same—Prosecution.*—It shall be the duty of every United States district attorney immediately to inquire into the facts of cases reported to him by collectors and the laws applicable thereto, and, if it appears probable that any fine, penalty, or forfeiture has been incurred by reason of such violation, for the recovery of which the institution of proceedings in the United States district court is necessary, forthwith to cause the

proper proceedings to be commenced and prosecuted, without delay, for the recovery of such fine, penalty, or forfeiture in such case provided, unless, upon inquiry and examination, such district attorney decides that such proceedings can not probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted, in which case he shall report the facts to the Secretary of the Treasury for his direction in the premises. (U. S. C., Title 19, Sec. 511.)

SEC. 605. *Same—Custody.*—All vessels, vehicles, merchandise, and baggage seized under the provisions of the customs laws, or laws relating to the navigation, registering, enrolling or licensing, or entry or clearance, of vessels, unless otherwise provided by law, shall be placed and remain in the custody of the collector for the district in which the seizure was made to await disposition according to law. (U. S. C., Title 19, Sec. 512.)

SEC. 613. *Disposition of proceeds.*—Any person claiming any vessel, vehicle, merchandise, or baggage, or any interest therein, which has been forfeited and sold under the provisions of this Act, may at any time within three months after the date of sale apply to the Secretary of the Treasury if the forfeiture and sale was under the customs laws, or to the Secretary of Commerce if the forfeiture and sale was under the navigation laws, for a remission of the forfeiture and restoration of the proceeds of such sale, or such part thereof as may be claimed by him. Upon the production of satisfactory proof that the applicant did not know of the seizure prior to the declaration or condemnation of forfeiture, and was in such cir-

cumstances as prevented him from knowing of the same, and that such forfeiture was incurred without any willful negligence or intention to defraud on the part of the applicant, the Secretary of the Treasury or the Secretary of Commerce may order the proceeds of the sale, or any part thereof, restored to the applicant, after deducting the cost of seizure and of sale, the duties, if any, accruing on the merchandise or baggage, and any sum due on a lien for freight, charges, or contribution in general average that may have been filed. * * *.

(U. S. C., Title 19, Sec. 520.)

SEC. 616. *Compromise of claims.*—It shall not be lawful for any officer of the United States to compromise or abate any claim of the United States arising under the customs laws for any fine, penalty, or forfeiture, and any such officer who compromises or abates any such claim or attempts to make such compromise or abatement, or in any manner relieves or attempts to relieve any person, vessel, vehicle, merchandise, or baggage from any such fine, penalty, or forfeiture shall be guilty of a felony and upon conviction thereof shall be punished by a fine of not more than $5,000 or by imprisonment for a term of not exceeding two years: *Provided*, That the Secretary of the Treasury shall have power to remit or mitigate any such fine, penalty, or forfeiture, or to compromise the same in the manner provided by law. (U. S. C., Title 19, Sec. 529.)

SEC. 618. *Remission or mitigation of penalties.*—Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this Act, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury if under

> the customs laws, and with the Secretary of Commerce if under the navigation laws, before the sale of such vessel, vehicle, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, or the Secretary of Commerce, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto. * * *. (U. S. C., Title 19, Sec. 532.)

Sections 602, 603, 604, 605, 606, 613, 616, and 618 of the Tariff Act of 1930, c. 497, 46 Stat. 590 (U. S. C. Sup. Title 19, Secs. 1602, 1603, 1604, 1605, 1606, 1613, 1916, and 1918) are substantially identical with the same sections of the Tariff Act of 1922.

Section 2(c) of the Act of March 3, 1927, c. 348, 44 Stat. 1381 (U. S. C. Sup. V, Title 5, Sec. 281a) provides:

> (c) The personnel of the Bureau of Prohibition shall perform such duties as the Secretary of the Treasury or the Commissioner of Prohibition may prescribe, and the personnel of the Bureau of Customs shall perform such duties (other than duties in connection with the administration of the National Prohibition Act, as amended, or any other law relating to the enforcement of the eighteenth amendment), as the Secretary of the Treasury or the Commissioner of Customs may prescribe.

U. S. GOVERNMENT PRINTING OFFICE: 1932

FILE COPY

APR 15

Supreme Court of the United States

No. 574.

GENERAL MOTORS ACCEPTANCE CORPORATION, a Corporation,
Intervener and Appellant,

vs.

UNITED STATES OF AMERICA,
Libelant and Appellee,

ONE (1) CHEVROLET SEDAN AUTOMOBILE,
Engine Number 1-247-061,
Respondent.

GENERAL MOTORS ACCEPTANCE CORPORATION, a Corporation,
Intervener and Appellant,

vs.

UNITED STATES OF AMERICA,
Libelant and Appellee,

ONE (1) CHEVROLET COUPE AUTOMOBILE,
Engine Number 113-462,
Respondent.

GENERAL MOTORS ACCEPTANCE CORPORATION, a Corporation,
Intervener and Appellant,

vs.

UNITED STATES OF AMERICA,
Libelant and Appellee,

ONE (1) CHEVROLET ROADSTER AUTOMOBILE,
Engine Number 966-050,
Respondent.

HOWARD AUTOMOBILE COMPANY OF LOS ANGELES,
a Corporation,
Intervener and Appellant,

vs.

UNITED STATES OF AMERICA,
Libelant and Appellee,

ONE (1) BUICK COUPE AUTOMOBILE,
Engine Number 2-083-140,
Respondent.

BRIEF FOR AMICUS CURIAE.

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THE COURT PRESS, INC.

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Respondent.

BRIEF FOR AMICUS CURIAE.

This brief is filed by Joseph G. Myerson, New York City, as *Amicus Curiae* with the permission of the Court, granted February 23, 1932.

Opinions Below.

The cases are before the United States Supreme Court on certificate of the United States Circuit Court of Appeals from the Ninth Circuit under Section 239, amended, of the Judiciary Code. No opinion was filed by the District Court.

Questions Presented.

The questions as certified by the United States Circuit Court of Appeals are as follows:

1. Does Section 26 of Title II of the National Prohibition Act repeal by implication and render inoperative in liquor importation and transportation cases the forfeiture provisions of the Customs Laws, in so far as offending vehicles are concerned? Or, putting the question in another form:

2. Do the mandatory provisions of Section 26 of the National Prohibition Act apply when the automobile has been seized while in the act of transporting intoxicating liquor across the border and some distance into the United States?

3. May the government, in such a case, ignore such mandatory provisions, arrest the driver, and elect to forfeit the automobile under the customs laws?

4. Is the record in the criminal case wherein the driver pleaded guilty of violating the customs laws (Tariff Act of 1930) admissible in the separate forfeiture proceedings wherein the intervener is the only party appearing, for the purpose of showing unlawful importation by the automobile, or for any other purpose?

Statutes Involved.

National Prohibition Act, Title II, Sec. 26, Chap. 85, Act Oct. 28, 1931; 41 St. L. 305, 315; 27 U. S. C. A. Sec. 40.

Sec. 26. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of the trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the same, shall pay all liens, according to their priorities, which are established, by intervention or otherwise, at said hearing or in any other proceeding brought

for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or if there be no newspaper published in such city or county, in a newspaper having circulation in the county once a week for two weeks, and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

Revised Statutes, Sec. 3061-3062, 19 U. S. C. A. 482-483.

3061. Search of vehicles and persons.—Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast or otherwise, and to search any trunk or envelope, wherever

found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial.

3062. Forfeitures.—Every such vehicle and beast, or either, together with teams or other motive power used in conveying, drawing, or propelling such vehicle or merchandise, and all other appurtenances, including trunks, envelopes, covers, and all means of concealment, and all the equipage, trappings, and other appurtenances of such beast, team or vehicle, shall be subject to seizure and forfeiture. If any person who may be driving or conducting, or in charge of any such carriage or vehicle or beast, or any person traveling, shall willfully refuse to stop and allow search and examination to be made as herein provided, when required so to do by any authorized person, he shall be punishable by a fine of not more than $1,000, nor less than $50.

Willis Campbell Act. Nov. 23, 1921, C. 134, Sec. 5, 42 Stat. 223, 27 U. S. C. A. 3.

3. Effect on existing legislation.—All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force on October 28, 1919, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly

in conflict with any provision of this title; but if any act is in violation of any of such laws and also of this title, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other.

Statement of Facts.

The following statement of facts is quoted from the certificate of the United States Circuit Court of Appeals for the Ninth Circuit:

> "On four different dates during July and August 1930, the four automobiles whose forfeiture is an issue were seized at ports of entry on the Mexican border, each vehicle having liquor concealed therein. Three of the cars were seized at San Ysidro, California, and the fourth at Calexico, California. Each car was observed crossing the international boundary line from Mexico and traveling some distance thereafter in the United States, and in each instance the concealed liquor was discovered at an official stopping place of the United States Customs Service. The seizures were effected by Customs officers.
>
> All four drivers of the cars were arrested. Each was charged with violations of the Tariff Act of 1930; namely, unlawfully importing liquor into the United States, and knowingly concealing and facilitating the transportation of such liquor. Each indictment alleged failure to obtain a permit, failure to pay duties, and failure to make entry at the custom house. The four defendants entered pleas of guilty to the first count, which charged importation, and were sentenced by the court. In each case, the remaining count was dismissed.
>
> A libel of information *in rem* was filed by the United States Attorney against each automobile, claiming its forfeiture under the provisions of Sections 3061 and 3062 of the Revised Statutes (19 U. S. C. A. 482 and 483). In three of the

cases the General Motors Acceptance Corporation intervened as owner of the attached automobiles, and in the other case the vehicle was claimed by the Howard Automobile Company. All the interveners set up proof of ownership, averred that they were innocent of any illegal acts in which the vehicles may have been involved, and prayed the court to dismiss the libels, contending that the government's sole remedy was under Section 26, Title II, of the National Prohibition Act (27 U. S. C. A. 40).

In each case, it was stipulated that the liquor alleged to have been found in the automobile was intoxicating in fact and fit for beverage purposes. It was further stipulated, subject to the objection by the libelant that such a purported defense was incompetent, irrelevant and immaterial, that neither the seller nor the intervener had any notice of the illegal use, or intended illegal use, of the automobile.

The government offered in evidence at the forfeiture proceedings the judgment roll, consisting of the indictment and sentence, in the criminal cases, at which, as stated above, pleas of guilty had been entered. The intervener in each case objected to the introduction of this judgment roll, on the ground that it was incompetent, irrelevant and immaterial; that no proper foundation had been laid; that the roll was not binding upon the intervener; and that it did not show that the intervener was a party to the criminal action or had notice of it. The objections were overruled and the records were admitted in evidence, to which the respective interveners duly excepted.

Testimony of customs officers showed that the four automobiles were driven across the international boundary some distance into the United States before being searched and seized.

The District Court entered decrees of forfeiture in all four cases, finding that each automobile was engaged in smuggling dutiable merchandise into the United States in violation of the customs law thereof."

Argument.

POINT I.

Proceedings in forfeiture of an automobile used for the smuggling into and transportation of intoxicating liquor within the United States must be instituted under Section 26 of the National Prohibition Act and may not be maintained under the Customs Act (R. S. 3061-3062).

For many years following the enactment of the National Prohibition Act enforcement officers, in prosecuting forfeiture of automobiles seized while transporting intoxicating liquors, variously invoked Sections 3061, 3062 of the Revised Statutes, the Customs sections, Section 3450 Revised Statutes, the Internal Revenue section, and Section 26 of the National Prohibition Act referring to transportation of intoxicating liquors.

It was urged upon the Government by representatives of the automobile industry that the use of these sections other than Section 26, was unfair and improper, and that Congress by the enactment of the National Prohibition Act intended that act to be the instrument of enforcing the prohibition of traffic in intoxicating liquors. This position was urged because the Customs and Revenue sections make no provision for safeguarding the rights of innocent lienors, whereas such rights are specifically respected under Section 26.

The Revenue Section, R. S. 3450 has been definitely adjudicated. The history of the litigation concerning this section becomes important in the present case in view of the close affinity between Sections 3450 and 3061-3062.

Both were enacted as an aid to the collection of taxes, the former, the revenue tax, the latter the customs; both statutes were part of the same tax plan enacted by Congress in July, 1866, R. S. 3450 on July 13, 1866, R. S. 3061-2 on July 18, 1866; both statutes provide for absolute forfeiture; neither statute makes recognition of the rights of innocent owners or lienors. Indeed it may be said that R. S. 3061-3062 are the "3450" of the Customs Laws.

Following the enactment of the National Prohibition Act, as already suggested, it was urged that R. S. 3450 had in effect been repealed. However, the United States Supreme Court held in 1926 (*United States* v. *One Ford Coupe Automobile,* 272 U. S. 321), that the section was still in force and effect and could in a proper case be invoked by the government. Representatives of the automobile industry thereupon urged the doctrine, accepting the soundness of the *Ford Coupé* decision, that nevertheless where transportation of intoxicating liquors was indicated, Section 26 of the Prohibition Act may and that section alone must be employed in forfeiture proceedings.

This issue was finally squarely presented to the United States Supreme Court in *Richbourg Motor Co.* v. *U. S.,* 281 U. S. 528. In that case the Court held that proceedings could not be maintained for forfeiture under R. S. 3450 of an automobile discovered and seized while being used illegally to transport intoxicating liquor.

It would seem, therefore, that the true inquiry in this case is whether the same reasons which impelled the Supreme Court so to decide in respect of the Internal Revenue section should not require a co-ordinate ruling

that the customs sections may not be employed in such a case.

That this is so becomes evident from attentive consideration of the argument and decision in the *Richbourg* case.

The fundamental basis of the argument in the *Richbourg* case, and of the decision, rested upon Section 5 of the Willis Campbell Act (27 U. S. C. A. 3) which provides that all laws in regard to manufacture and taxation of and traffic in intoxicating liquor and all penalties for violation of such laws that were in force on October 28, 1919, shall be and continue in force as to beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act. It was urged and the Supreme Court in effect found that Section 26 of the Prohibition Act is in direct conflict with, and as to a case involving violation of both, has repealed Section 3450. It is now submitted that Section 26 is in direct conflict with and as to a case involving a violation of both has vitiated the provisions of R. S. 3061-62.

Analysis of the mandatory provisions of Section 26 indicates this direct conflict. The provisions of this section require:

(a) That upon an officer discovering that intoxicating liquor is being illegally transported or illegally possessed *it shall be his duty to*

1. Take possession of the automobile.
2. Arrest the person in charge thereof.
3. Proceed against the person arrested under the provisions of the National Prohibition Act.

(b) That the Court, upon conviction of the person, *shall*

1. Order the liquor destroyed.

2. Order the public sale of the automobile, unless good cause to the contrary is shown by the owner thereof.

(c) That the officer carrying out the order of sale of the Court *shall*

1. After deducting certain expenses provided for in the statute pay all liens according to their priority, which are established by intervention or otherwise as being *bona fide* and existing in favor of one who had no notice of the proposed illegal use of the vehicle.

In short, the section is mandatory in its statement as to the duties and obligations of the arresting officer and the Court whenever there shall be discovered a violation of Section 26. The arresting officer, where violation of this section and another statute are both indicated, may not elect which remedy he shall pursue, the United States Attorney may not so elect and the Court may not. Indeed there may be no executive or judicial election, for as Mr. Justice Butler has pointed out in his dissenting opinion in the *Ford Coupe* case, the law, that is, Section 26, makes the election.

Absurd conclusions follow unless the word "shall" as used in this section is accepted and construed in the injunctive sense of "must".

If the word "shall" as used in Section 26 were given the discretionary interpretation urged by the government we would have a statute providing that "when the commissioner, his assistants, inspectors or any officer of the law shall discover any person in the act of trans-

porting in violation of the law intoxicating liquors in any wagon, automobile, water or air craft or other vehicle, it *may* be his duty to seize any and all intoxicating liquors found therein being transported contrary to law."

It is obvious that such an interpretation will not lie. Indeed if the wording were "He shall seize", instead of "it shall be his duty to seize", the word "shall" would require a mandatory interpretation. But the very use of the term "it shall be his duty to seize", eliminates any possible doubt as to whether Congress intended that the provision should be mandatory.

The next sentence of Section 26, if given a discretionary construction, would require the following reading: "Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he *may* take possession of the vehicle and team or automobile, boat, air or water craft or any other conveyance and *may* arrest any person in charge thereof."

This construction is illogical since it would permit an officer discovering a violation of the law to exercise his discretion as to whether or not to arrest the person unlawfully engaged.

Reading further in Section 26 it becomes evident that the very next sentence requires beyond all question, a mandatory and not a discretionary construction of the preceding sentence. For it *assumes that the arrest shall have been made,* to-wit, "* * * and shall arrest any person in charge thereof. Such *officer shall at once proceed* against the person arrested *under the provisions of this title* in any court having competent jurisdiction." CAN THIS POSSIBLY MEAN THAT THE OFFICER *MAY* AT ONCE PROCEED? OR THAT HE MAY PROCEED UNDER SOME OTHER STATUTE?

It is submitted that there is a direct conflict between Section 26 and Sections 3061-3062 by reason of the fact that Section 26 in mandatory language requires that proceedings must be brought under Section 26 whenever violation of that section is discovered. Being mandatory the section precludes recourse to Sections 3061-3062 or any other sections where a violation of both is discovered, thereby furnishing the direct conflict referred to in the Willis Campbell Act.

This identical argument was presented to the Supreme Court in the *Richbourg* case to sustain the proposition that Section 26 was in direct conflict with, and in a case involving a violation of both had repealed, Section 3450. How was it received by the Court? The opinion of the Court recites:

> "This language of Section 26 is in form mandatory throughout. It is made the 'duty' of the officer discovering any person in the act of transporting liquor to seize the liquor, when 'he shall take possession of the vehicle' and 'shall arrest any person in charge' of it. He 'shall at once proceed against the person arrested under the provisions of this title'. The vehicle 'shall be returned to the owner' upon his giving bond. 'The court upon conviction of the person so arrested * * * shall order a sale by public auction of the property seized' and the officer making the sale 'shall pay all liens which are established * * * as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor * * *'. It is plain that, whenever the vehicle seized by the arresting officers is discovered in use in the prohibited transportation, literal compliance with these requirements would compel the forfeiture under Section 26 with the consequent protection of the interests of innocent

lienors. To that extent, Section 26, if interpreted to exact such compliance, is in direct conflict with the forfeiture provisions of Section 3450 and supersedes them whenever any person within the provisions of Section 26 is discovered 'in the act of transporting * * * intoxicating liquors in any * * * vehicle,' which liquor is 'removed * * * deposited or concealed * * * with intent to defraud the United States' of the tax. But the government contends that Section 26 is not to be read thus literally; that it was not intended by its mandatory phrases to do more than state generally the duty resting on all law enforcement officers to enforce the law, but which leaves them free, when the same act or transaction constitutes an offense under different statutes, to proceed under either one. It is argued that Section 26 could not have been intended to preclude district attorneys from prosecuting violations of Section 3450 merely because they involve transportation, and it can no less be taken to deprive them of their election to forfeit the offending vehicle under either section.

"Undoubtedly, 'shall' is sometimes the equivalent of 'may' when used in a statute prospectively affecting government action. See *Railroad* v. *Hect*, 95 U. S. 168; *West Wisconsin Ry. Co.* v. *Foley*, 94 U. S. 100, 103. The usual provisions of criminal statutes prescribed is not necessarily to be taken, as against the government, to direct prosecution under that rather than some other applicable statute.

"But the prescription in detail, by Section 26, whenever transportation is involved, of successive steps to be taken which, if followed, lead unavoidably to forfeiture under that section and no other, with the important consequence of protecting the interests of innocent third persons, suggests a definite purpose to make the protection effective by bringing all forfeitures in such cases under its controlling provisions. If the purpose were the more general one of imposing on government officers the general duty to procure the forfeiture at their election, either under Section 26 or any

other applicable statute, most of the requirements of Section 26 might have been omitted. The end sought could have been attained more easily by the simple enactment, in the language of Section 3450, that the offending vehicle 'shall be forfeited', saving the rights of innocent lienors if the proceeding were had under Section 26.

And again *'We think that Congress did not take the precaution to enact the carefully chosen language of Section 26 merely to impose general duties on prosecuting officers, already placed on them by other sections of the Act, but that its purpose was to preclude the nullification of the protection which Section 26 has extended to innocent third persons'."* (Italics ours.)

What the Supreme Court pronounced in the *Richbourg* case concerning the effect of the enactment of the National Prohibition Act upon the Revenue Laws (R. S. 3450) applies with equal force to its effect upon R. S. 3061-3062. Indeed the government recognized and urged both in its brief in the *Richbourg* case and in its argument before the Court that an adverse decision would bar the use by the government of the customs sections in cases just such as are now under consideration. As a matter of fact in the *Davies Motor Company* case, argued and decided with the *Richbourg* case, the facts of record showed that the liquor was smuggled.

In its brief submitted to this Court in the case of *Richbourg Motor Co.* v. *United States,* No. 452 of the October, 1929 term, the Government took the position that if that case was decided adversely to the Government, it would follow that in a case involving transportation the customs sections could not be employed, or in other words, that the theory advanced by the petitioner in the *Richbourg* case relative to R. S. 3450 is equally applicable

to R. S. 3061-62. We quote from the Government's brief, at page 23:

> "The construction of Section 26 as compulsory and exclusive in all cases where transportation is involved will produce consequences which could hardly have been intended * * * where a vehicle is used to smuggle intoxicating liquor and is seized while transporting such liquor across an international border, it may be forfeited only under Section 26, although the offense of smuggling, entailing a complete forfeiture under Sections 3061-62 R. S. (U. S. C. Title 19, Sections 481-483), has been simultaneously committed. * * * In short, where a vehicle or vessel is used in the illegal transportation of liquor, the Government is precluded from securing a forfeiture not only under Section 3450 for tax evasion, but under any other statute imposing a forfeiture for some other simultaneous offense, such as under the Customs or Navigation Laws, where the interests of innocent owners are not saved."

POINT II.

A. The basis of the alleged conflict between the Customs sections and the National Prohibition Act is identical with the basis of the alleged conflict between the Revenue section and the National Prohibition Act.

B. No greater statutory relief is afforded an aggrieved claimant under the Customs sections than is afforded an aggrieved claimant under the Revenue sections.

We have seen that the basic conflict between the Revenue Law and the Prohibition Law rests upon the fact, first, that the Prohibition Law being mandatory

precludes recourse to any other section, and second, and more forcibly, the fact that the Revenue section does not save the rights of innocent parties whereas the National Prohibition Act does. This conflict was very clearly indicated by Mr. Justice Stone in his concurring opinion in the *Ford Coupe* case. Although what he stated referred to the Revenue section, no violence would be done to the force of his logic if his language were adapted to refer to the Customs sections. Mr. Justice Stone said:

> "I agree that the Willis Campbell Act requires Section 3450 of the Revised Statutes and Section 26 of the National Prohibition Act to be so construed as to stand together *in so far as they are not in direct conflict.*
>
> "I agree also that there conceivably may be a deposit or concealment of illicit liquor in an automobile with intent to defraud the United States of the tax upon it, which is not transportation within the meaning of Section 26, and to that extent the two sections are not in conflict. *But I cannot subscribe to those expressions in the opinion which seem to suggest that the two sections are not in direct conflict in a case where there is transportation of liquor in a vehicle in violation of the National Prohibition Law with intent to deprive the United States of the tax. In that case Section 26, it seems to me, plainly directs that the seizure shall be made and proceedings for the forfeiture of the seized vehicle had under that section.* In that event Section 26 saves the interest of the innocent owner or lienor from the forfeiture required by Section 3450. It appears to me that the conflict in such a case is direct and that Section 26 by its terms is controlling." (Italics ours.)

The Government has also taken this view of the conflict between the sections. In its brief in these cases

before the United States Circuit Court of Appeals (unfortunately the Government's brief before this Court has not been received at the present writing) it attempts to show that this conflict does not exist as between the Prohibition and the Customs Laws by endeavoring to indicate that the rights in seized property of innocent parties are preserved and guarded under the Customs Laws. We quote from page 10 of the Government's brief before the United States Circuit Court of Appeals.

> "In dealing with the Customs Laws, therefore, if it may be demonstrated that the rights in seized property of such innocent persons are preserved and guarded by the law the basis of the conflict is removed, and if there be no conflict the two sets of laws may then stand side by side available for use as desired by the prosecuting officers under the facts."

We agree with that hypothesis.

The Government's brief then goes on to point out that under Sections 613 and 618 of the Tariff Act of 1930 (19, U. S. Code 1613, 1618) an innocent owner or lienor may apply to the Secretary of the Treasury for remission or mitigation of the forfeiture and argues that this right to petition for remission or mitigation preserves the rights of the innocent owners and lienors and therefore dissipates the apparent conflict. However, that the right to petition the Secretary of the Treasury for remission or mitigation removes the conflict does not appear to be the view of this Court, for the identical sections, 613 and 618 of the *Tariff Act* are available to an innocent owner or lienor whose property has been forfeited under the *Revenue Section 3450,* involved in the *Richbourg* case, just as they are available to one affected by the Customs forfeiture sections. Section 709 of the Revenue

Act of 1928 provides "The provisions of law applicable to the remission or mitigation under the Customs Laws shall apply to forfeitures incurred or alleged to have been incurred before or after May 29, 1928, under the Internal Revenue Laws".

Surely if this Court was not of the opinion when it decided the *Richbourg* case that these remission sections preserved the rights of innocent owners and lienors no good reason appears why a different interpretation or construction should now be made.

It is not difficult to understand that the right to petition the Secretary of the Treasury or the Attorney General affords only poor and inadequate protection, if any, to the aggrieved innocent lienholder or owner. In an important contribution to the law of forfeitures, a practising attorney of long experience with forfeiture cases has observed:

> "The Tariff Act provides for the remission or mitigation of forfeitures incurred without willful negligence or intention on the part of the owner or lienholder to violate the law. Act June 17, 1930, c. 497, 46 Stat. 757, Sec. 618, 19 U. S. C. A. Sec. 1618; Prohibition Reorganization Act. May 27, 1930, c. 342, Sec. 1, 46 Stat. 427, 27 U. S. C. A. 101-108. This provision has been extended to the Internal Revenue Act. May 29, 1928, c. 852, Sec. 709, 45 Stat. 882, 26 U. S. C. A. Sec. 2709. The procedure is a petition addressed to the proper member of the Cabinet: The Secretary of the Treasury, The Secretary of Commerce, or the Attorney General as the case may be.
>
> 'The purpose * * * is, obviously, that of protecting the interests of innocent persons.' Treasury Decision 35, July 12, 1928.
>
> However beautiful may be the theory, experience demonstrates that the purported protection

is valueless. Effective operation of administrative remission under modern conditions is impossible. During four and one-half years of contact with forfeiture cases, the author has seen the claims of innocent petitioners repeatedly stricken down. It is this situation which necessitates this note.

Obviously no cabinet officer can give to each petition for remission adequate personal consideration, yet personal judgment is mandatory and the discretion is non-delegable. *United States ex rel. Heller* v. *Mellon,* 40 Fed. (2d) 808 (D. C. App. 1930). The adjudication cannot be reviewed by any court. *General Finance Co. of Louisiana* v. *United States,* 45 Fed. (2d) 380 (C. C. A. 5th, 1930).

Even if the official, neglecting national issues, personally considered each petition, he could not grant adequate relief. He is limited to the petition and affidavits filed by the claimant and the reports of his own officials, which are apparently in all cases presumed to be true. Although the remission statute grants the Administrative official the right to have testimony taken, the right is seldom if ever used. Sitting as a trial court, he has no evidence to act on and is responsible to no appellate jurisdiction!

The petitioner has no right to face those who accuse him of negligence or connivance—facts that must be found before the Cabinet member has any justification for refusing the petition. The petitioner has no right to cross examine those who accuse him. Having filed his petition, he must wait in silence for the decision from Washington. What reports are sent to the capital he never knows.

Another practical impediment to remission has received scant attention. By the Act of Mar. 3, 1925, c. 438, Sec. 2, 43 Stat. 1116, 19 U. S. C. A. 523, as amended May 27, 1930, c. 342, Sub-Sec. 9, 10; Stat. 430, 27 U. S. C. A. 42, it is provided that any vehicle forfeited through Court for violation of the Prohibition, Internal Revenue or Cus-

toms Acts may, upon application of the head of the department for which the seizure was made, be transferred by the Court to the federal officials for use in the enforcement services. By the same act it is provided that in case of summary forfeiture, such a transfer may be made by the head of the department himself.

Witness the party becoming judge in his own case—a condition contrary to the fundamentals of our jurisprudence. Faced with a petition for remission and a request from his subordinates for a transfer of the car, the Cabinet official must find himself in an embarrassing situation. In such a case it is much simpler to refuse the petition of a stranger than to refuse the application of a subordinate for an instrument that, without cost, will increase the effectiveness of enforcement.

It is provided that the court, in court forfeitures, *may* transfer the automobile, but it is interesting to note that the innocent owner or lienor has no right to oppose such an order and insist on the questionable right of salvaging some part of his loss by buying the car on auction sale. *The Alert,* 24 Fed. (2d) 239.

To all practical intents, therefore, there is no effective protection of the innocent under these acts" (McDonald, Automobile Forfeitures, Texas Law Review, February, 1932).

Section 26 of the National Prohibition Act permits the aggrieved innocent owner or lienor to present his claim before the Court. Until the Congress sees fit to amend the Tariff Act to give an innocent lienor or owner that same right it cannot be said that the dubious administrative relief of mitigation or remission "by grace" is a saving of the claimant's rights equivalent to the protection afforded him by the Prohibition Act so as to eliminate the conflict.

POINT III.

A. Section 26 Title II of the National Prohibition Act supersedes the forfeiture provisions of Sections 3061-3062 of the revised statutes in cases involving both the unlawful importation and transportation of intoxicating liquor.

B. There has been no reenactment of those provisions of Sections 3061-3062 here involved.

Section 3062 alone provides for forfeiture of the vehicle unlawfully engaged. Section 3061 somewhat modified was partially reenacted as Section 581 of the Tariff Act of 1922, as follows:

> "Officers of the customs or of the Coast Guard, and agents or other persons authorized by the Secretary of the Treasury, or appointed for that purpose in writing by a collector may at any time go on board of any vessel or vehicle at any place in the United States or within four leagues of the coast of the United States, without as well as within their respective districts, to examine the manifest and to inspect, search, and examine the vessel or vehicle, and every part thereof, and any person, trunk, or package on board, and to this end to hail and stop such vessel or vehicle, if under way, and use all necessary force to compel compliance, and if it shall appear that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which such vessel or vehicle, or the merchandise, or any part thereof, on board of or imported by such vessel or vehicle is liable to forfeiture, it shall be the duty of such officer to make seizure of the same, and to arrest, or, in case of escape or attempted escape, to pursue and arrest any person engaged in such breach or violation."

Section 3061 as it still appears as Section 482 of 19 U. S. C. A. set forth at page 4 of this brief, was not reenacted, nor was any part of 3062 reenacted in either the Tariff Act of 1922 or 1930. In other words the sections under which these particular libels are brought remained in force only by virtue of their original enactment *prior to the National Prohibition Act* and are therefore statutes which were "in force" within the meaning of the Willis Campbell Act.

It is true, as the government will undoubtedly point out, that other sections may be found in the Tariff Law affecting importation, but these cases are concerned specifically with Sections 3061-3062, never reenacted.

Indeed, if there had been a reenactment of these particular sections they would not supersede the Prohibition section. Such result might have followed if instead of enacting new general Tariff laws, Congress had singled out these particular sections for amendatory legislation. It might even have followed if Congress enacting a new general Tariff Law had made substantial changes in the forfeiture sections. That is not, however, the case.

Between the time of the enactment of the Willis Campbell Act in 1921 and the Tariff Act of 1922, Revised Statutes, Sections 3061-2 were statutes "in force" within the meaning of the Willis Campbell Act. They occupied the same relative position to Section 26 of the Prohibition Act as did Section 3450, for all were sections enacted prior to 1919 and all contained provisions which were subsequently to be held in conflict with Section 26.

The mere restatement or reenactment of these provisions would not have changed the position which Sections 3061-3062 occupied relative to Section 26 of the Prohibition Act, because the identical sections "in force" before

the adoption of the 1922 act would have continued "in force" after such adoption. To assume that the mere restatement of these sections already "in force" would have changed the position which these sections occupied relative to Section 26, we must reach the conclusion that Sections 3061-2 if reenacted would be open to different construction from 3061-2 already in force. That conclusion would not lie, for it has been repeatedly held that the reenactment in the same or substantially the same terms of a statute which has received a judicial construction, amounts to a legal adoption of such a construction (*Heald* v. *District of Columbia,* 254 U. S. 20; *U. S.* v. *Feld,* 204 U. S. 142).

As far as its effect upon forfeiture procedure is concerned, the reenactment of these sections would be negative and superfluous; because even if there had been no Tariff Act of 1922 and no Tariff Act of 1930, the old provisions 3061 and 3062 would continue "in force" just as does 3450 and would be available to the government in all cases except those involving transportation of intoxicating liquor. It will be remembered that in the *Ford Coupe* case the petitioners had contended that the enactment of the Prohibition Law had in effect repealed Section 3450. If that contention had been sustained then a reenactment of Section 3450 would have been necessary before that section could have been invoked in a case *not* involving transportation. That is clear from the language of Mr. Justice Stone in the *Ford Coupe* case as well as in the *Richbourg* case where the mandatory language of Section 26 is so carefully analyzed and where such importance is given to it.

So it is with the Customs sections, no reenactment was necessary to preserve those sections to the use of the government in a case not involving transportation; the

reenactment would not make the sections available to the government in a case which does involve transportation.

It is, of course, a well established doctrine that a later statute, general in its terms and not expressly repealing a prior statute, will not ordinarily affect the special provisions of such earlier statute (*In re Crow Dog,* 109 U. S. 536).

This doctrine was urged by the petitioner in *Callahan* v. *United States,* 576, decided April 11, 1932 (United States Daily, April 12, 1932) by this Court. The following is quoted from the opinion of the Court:

> "We are asked to hold that one who violates the Prohibition Act by importing liquor may not be indicted, tried and sentenced under the Tariff Act which makes the importation of 'any merchandise contrary to law' a criminal offense. The phrase 'contrary to law' as used in a later act is unqualified, and taken in its natural meaning signifies 'contrary to any law', and hence contrary to the earlier Prohibition Act, so that a violation of that Act would be an offense within the other. * * *
>
> The petitioner urges that the National Prohibition Act deals specifically with intoxicating liquor, prohibits its importation and provides a penalty therefor; whereas the Tariff Act is concerned with a wholly separate subject, and the penal section 593-b aimed at unlawful importation should not be construed as repealing the earlier special statute.
>
> This argument overlooks the fact the National Prohibition Act prescribed no special penalty for importation and violation of its provisions. Section 26, of Title II, an omnibus section fixing penalties for violations for which no special penalty is prescribed, is the only one under which punishment could be imposed for illegal transportation. The language used is sufficiently broad

to include specific penalties fixed in other sections of the statute and also such as might be imposed by separate legislation. The Tariff Act, a later statute, fixes a definite penalty for one of the violations grouped in the penal section of the earlier act. In this respect it superseded the general provisions of the prior statute embracing the same statute."

If any analogy is to be drawn between the *Callahan* case and the instant case, is it not that inasmuch as Section 26 of the National Prohibition Act is concerned with a specific unlawful act, that is, transportation, and fully prescribes the procedure for forfeiture in a case involving transportation, the reenactment of the Customs sections, which do not specifically concern themselves with transportation offenses, unassociated with unlawful importation, would be subject to the rule above referred to—that the later general statute should not be construed as repealing the earlier special statute.

However, speculation on the possible effect of the reenactment of the section under which these libels are brought is perhaps unprofitable since there was no such reenactment.

Conclusion.

The position set forth in this brief is supported not alone by precedent and statute but by logic and by the dictates of fairness and justice. It is supported by statute in that the forfeiture provisions of the Customs Law being inconsistent with the provisions of the National Prohibition Act are declared by the Willis Campbell Act to have been superseded by the latter. It is supported by logic in that it is unreasonable to assume that the Congress enacting a Prohibition Act in 1919 should have intended that a provision deliberately included in that Act

be discarded for enforcement purposes in favor of a provision of an Act of 1866, the current use of which is so obviously designed to accomplish the general intent of the discarded section, while at the same time making nugatory and unavailable those provisions of that section which protect innocent lien holders. The Prohibition Act was designed to correct an evil and was never intended to be the instrument with which to visit forfeitures and penalties upon innocent persons. It is supported by fairness and justice since the drastic remedy of the Customs Law is directed not alone against the transgressor, but against the innocent lienor, whose rights are so clearly intended to be guarded by the National Prohibition Act.

Justice, for example, can hardly countenance the confiscation of an automobile and the forfeiture of the property of an innocent lienor and the abandonment of any criminal prosecution of the actual offender. Yet such cases are frequent.

"The frequent practice of prosecutors is to secure forfeiture under the tax law in advance of bringing a criminal prosecution, if any." Howard Lee McBain, Ruggles Professor of Constitutional Law in Columbia University. "Prohibition Legal and Illegal," Macmillan 1928.

It is, we believe, a fair assumption that the conditions surrounding the initial enactment of the forfeiture provisions of the Customs Law were so different from those surrounding the passage of the Prohibition Act that this Court is justified in taking judicial notice of the differing conditions. The commercial and banking contacts in the period of 1866 were direct and simple and it is fairly inferable that vendors, vendees and mortgagees had opportunity to have reasonable notice of their respective

purposes and intentions. We are now in a totally different age, in which such parties know nothing of each other and in most transactions do not even meet. Commercial and banking transactions are impersonally conducted, in fact cannot be conducted in any other manner. Trade, commerce and banking must be facilitated with rapid and intelligent service. This is fundamentally the age of transportation—the motor age. The mass production of motors and its complement, mass consumption, required the creation of coordinated banking facilities for consumers, as the majority of motors are sold on credit with supporting liens on the motors so sold (see Prof. Edwin R. A. Seligman, MacVickar Professor of Political Economy, Columbia University, on "The Economics of Installment Selling"—Harper & Bro. 1927), Great banking institutions have arisen specializing in this type of credit. Subtract the credit sales of motors and this great industry would shrink in volume to its great damage and that of related and supporting industries. The framers of the Prohibition Act in drafting Section 26 must have had in mind the equitable protection of the banking institutions which in good faith, lawful purpose and innocence of conniving at infractions of law, finance motor lien paper to the extent of billions of dollars per annum. What good purpose can be subserved by visiting losses upon them by invoking the operation of a statute whose harshness was so obviously intended to be negatived by the terms of Section 26?

It may be pertinent to indicate to this Court that those who have suffered from the promiscuous use of the Customs Sections, bankers and automobile merchants, have no quarrel with the National Prohibition Act nor with its strict enforcement. They neither condone the offenses against it nor approve or support the offender.

Great care is employed to finance only sound risks and to prevent automobiles from coming into possession of bootleggers, rum runners and other improper persons.

These forfeiture proceedings have resulted from those instances where, notwithstanding the care exercised to prevent it, cars have been purchased, generally through subterfuge, by those unlawfully engaged or those who purchase with intent of lawful use and later determine to engage in illegal acts.

Your *Amicus*, speaking for the automobile merchants and the special banking corporations which are interested, respectfully submits that justice cannot give countenance to permitting the resurrection of an ancient statutory provision for the harsh enforcement of a modern statute to the injury of innocent persons whose rights that modern statute itself jealously preserves.

> "The damnable character of the 'bootlegger's' business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods. 'To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; * * * in short, to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice'" (Mr. Justice McReynolds, dissenting in *Carroll* v. *United States*, 267 U. S. 132, at 163).

It is respectfully submitted that questions 1 and 2 should be answered "Yes" and that question 3 should be answered "No".

Respectfully submitted,

JOSEPH G. MYERSON,
Amicus curiae.

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Supreme Court of the United States

No. 574.

GENERAL MOTORS ACCEPTANCE CORPORATION, a Corporation,
Intervener and Appellant,

vs.

UNITED STATES OF AMERICA,
Libelant and Appellee,

ONE (1) CHEVROLET SEDAN AUTOMOBILE,
Engine Number 1-247-061,
Respondent.

GENERAL MOTORS ACCEPTANCE CORPORATION, a Corporation,
Intervener and Appellant,

vs.

UNITED STATES OF AMERICA,
Libelant and Appellee,

ONE (1) CHEVROLET COUPE AUTOMOBILE,
Engine Number 113-462,
Respondent.

GENERAL MOTORS ACCEPTANCE CORPORATION, a Corporation,
Intervener and Appellant,

vs.

UNITED STATES OF AMERICA,
Libelant and Appellee,

ONE (1) CHEVROLET ROADSTER AUTOMOBILE,
Engine Number 966-050,
Respondent.

HOWARD AUTOMOBILE COMPANY OF LOS ANGELES,
a Corporation,
Intervener and Appellant,

vs.

UNITED STATES OF AMERICA,
Libelant and Appellee,

ONE (1) BUICK COUPE AUTOMOBILE,
Engine Number 2-083-140,
Respondent.

SUPPLEMENTAL BRIEF OF AMICUS CURIAE.

JOSEPH G. MYERSON,
New York City.
Amicus Curiae.

THE COURT PRESS, INC.

Supreme Court of the United States

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Respondent.

GENERAL MOTORS ACCEPTANCE CORPORATION, a Corporation,
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vs.

UNITED STATES OF AMERICA,
Libelant and Appellee,

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Engine Number 906-050,
Respondent.

HOWARD AUTOMOBILE COMPANY OF LOS ANGELES,
a Corporation,
Intervener and Appellant,

vs.

UNITED STATES OF AMERICA,
Libelant and Appellee,

ONE (1) BUICK COUPE AUTOMOBILE,
Engine Number 2-083-140,
Respondent.

SUPPLEMENTAL BRIEF OF AMICUS CURIAE.

The government's brief has very strongly urged that the intent of Congress that the Prohibition Act should

not supersede the Customs sections is indicated by the fact that Section 26 by its terms refers only to transportation and makes no mention of importation.

We submit that is a very strong argument indicating that the Customs sections have not been superseded generally, that is to say, as to cases not involving transportation, but that it is no answer to the proposition that in a case of transportation where importation also exists, Section 26 is paramount.

It is a confusing thought, rendered so especially because it is difficult to conceive of an importation without transportation, but if we approach the proposition subjectively without attempting to picture the importation, the confusion is dissipated.

Perhaps this will be made somewhat easier by going back to the proposition that was submitted to this Court in the *Richbourg* case.

This Court had held in the *Ford Coupe* case that the Revenue Act had not been superseded by Section 26.

> "The serious question presented is whether there is such a direct conflict between the National Prohibition Act and particularly Section 26 of Title II thereof, and Section 3450 of the Revised Statutes as to render the latter section inoperative and unavailable to the government where a vehicle was being used for the purpose of depositing and concealing illicitly distilled liquors under the circumstances set forth in the libel." *U. S.* v. *One Ford Coupe Automobile*, 272 U. S. 321, 325.

It will be remembered that Section 3450 applies to tax unpaid liquor deposited or concealed or removed to defraud the government of the tax. Section 26 makes no reference whatsoever to concealment, no reference whatsoever to deposit, no reference whatsoever to removal (ex-

cept that transportation is implied within the meaning of the term "removal", but then of course transportation is also implied within the meaning of the term "importation"), no mention is made in Section 26 of unpaid taxes nor of frauds upon the government.

The fact that Section 26 refers to transportation alone and makes no reference to the elements found within Section 3450 might very well have been the basis of the Court's finding in the *Ford Coupe* case. Indeed, Mr. Justice Brandeis points out at page 334: "While the second sentence in Section 26 uses the words 'transported or possessed' the context makes it very plain that the possession intended is possession in transportation. Hence that section is applicable only if a person is discovered in transporting intoxicating liquor in violation of law. *There is no allegation in the libel that the automobile had been so discovered or was being so used.*" (Italics ours.) So that appreciating the limitations of the language of Section 26 in that the section refers only to transportation, Mr. Justice Brandeis found no conflict between Section 3450 and Section 26, only because an element of transportation was lacking.

In like manner the fact that Section 26 contains no specific reference to importation may properly become the basis of a finding by this Court that Section 26 does not supersede the Customs sections in cases which do not involve transportation, but would furnish no basis for a finding that Section 26 does not supersede Section 3061-2 in a case which does involve transportation, however incidental.

That was the situation, then, before the decision in the *Richbourg* case. In that case your *Amicus*, as attorney for the petitioner, Richbourg Motor Company sub-

mitted the proposition that whereas Section 26 had not generally superseded Section 3450, nevertheless in a case of violation of Section 3450 where transportation was involved, Section 26 became paramount (See Mr. Justice Stone's concurring opinion in the *Ford Coupe* case at p. 335 and Mr. Justice Butler's concurring opinion in the case of *Port Gardner Investment Co.* v. *United States*, 272 U. S. 564, 567, where he said: "The substance of that question is whether the Prohibition officer discovering one in the act of transportation may disregard the plain and direct commands of Section 26 to proceed against the vehicle as there directed. I think he has no more right to ignore that command than he has to let the liquor and offender go. The law makes the election").

This Court sustained that proposition by unanimous opinion.

No reason has been indicated why the failure of Section 26 to refer to importation should operate to continue Sections 3061-2 paramount as against Section 26 which would not also operate to make Section 3450 supersede Section 26, and unless this Court is prepared absolutely to abandon the doctrine of the *Richbourg* case it is respectfully submitted that Section 26 must be declared paramount to Sections 3061-2 in the cases at Bar.

But Congress did not intend that any section other than Section 26 should be employed in the forfeiture of vehicles used illegally to import intoxicating liquor.

It has been pointed out that schedule 8 of the Tariff Act of 1922 (42 Stat. 897) and schedule 8 of the Tariff Act of 1930 (46 Stat. 639) make imported liquors subject to duty therein scheduled. And it has been pointed out that in both Tariff Acts Congress provided (Par. 813, Schedule 8, Tariff Act of 1922, 42 Stat. 898; Par. 814,

Schedule 8, Tariff Act of 1922, 42 Stat. 898; Par. 814, Schedule 8, Tariff Act of 1930, 46 Stat. 640) that "any such wines, spirits or other liquors or articles imported or brought into the United States without a permit shall be seized and forfeited in the same manner as for other violations of the Customs Laws."

That provision of law, not so much by reason of what it provides as by reason of what it omits, is the best indication we have of the intent of Congress that Section 26 shall continue to be applicable to the forfeiture of vehicles and vessels engaged illegally in the importation of intoxicating liquor, for **nowhere in these tariff acts is specific provision made for the forfeiture of the vessel or vehicle used to import intoxicating liquors.**

This is of the utmost significance. It is no answer to say that under the sections generally providing for forfeiture of vehicles used illegally to import merchandise such forfeiture can be had. Because if Congress had intended the general forfeiture provisions to apply to liquor violations, there was no reason to have provided, as above quoted, specifically for the forfeiture of the intoxicating liquor. Such liquor could have been forfeited under the general provisions affecting all illegally imported merchandise, and the very fact that Congress made this specific provision in respect of liquor gives greater significance to the failure of Congress to make specific provision in respect of forfeiture of the vehicle.

We do not subscribe to the doctrine of the dominant character of the enterprise urged upon this Court by counsel in the *Commercial Credit Company* cases.

Respectfully submitted,

JOSEPH G. MYERSON,
Amicus Curiae.

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 574.—October Term, 1931.

General Motors Acceptance Corporation, Appellant,
vs.
United States of America, Appellee.
One Chevrolet Sedan Automobile, Engine Number 1-247-061, Respondent,

Same,
vs.
United States of America, Appellee.
One Chevrolet Coupe Automobile, Engine Number 113-462, Respondent,

Same,
vs.
United States of America, Appellee.
One Chevrolet Roadster Automobile, Engine Number 966,050, Respondent.

Howard Automobile Company of Los Angeles, Appellant,
vs.
United States of America, Appellee.
One Buick Coupe Automobile, Engine Number 2-083,140, Respondent.

On certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

[May 2, 1932.]

Mr. Justice Cardozo delivered the opinion of the Court.

The facts stated in the certificate are these:

"The record presents four consolidated automobile forfeiture cases in which the same disputed legal questions are involved.

"On four different dates during July and August, 1930, the four automobiles whose forfeiture is in issue were seized at ports of entry on the Mexican border, each vehicle having liquor con-

cealed therein. Three of the cars were seized at San Ysidro, California, and the fourth at Calexico, California. Each car was observed crossing the international boundary line from Mexico and traveling some distance thereafter in the United States, and in each instance the concealed liquor was discovered at an official stopping place of the United States Customs Service. The seizures were effected by Customs officers.

"All four drivers of the cars were arrested. Each was charged with violations of the Tariff Act of 1930; namely unlawfully importing liquor into the United States, and knowingly concealing and facilitating the transportation of such liquor. Each indictment alleged failure to obtain a permit, failure to pay duties, and failure to make entry at the custom house. The four defendants entered pleas of guilty to the first count, which charged importation, and were sentenced by the court. In each case, the remaining count was dismissed.

"A libel of information in rem was filed by the United States attorney against each automobile, claiming its forfeiture under the provisions of Sections 3061 and 3062 of the Revised Statutes [19 U. S. C. A. 482 and 483]. In three of the cases the General Motors Acceptance Corporation intervened as owner of the attached automobiles, and in the other case the vehicle was claimed by the Howard Automobile Company. All the interveners set up proof of ownership, averred that they were innocent of any illegal acts in which the vehicles may have been involved, and prayed the court to dismiss the libels, contending that the government's sole remedy was under Section 26, Title II, of the National Prohibition Act [27 U. S. C. A. 40].

"In each case, it was stipulated that the liquor alleged to have been found in the automobile was intoxicating in fact and fit for beverage purposes. It was further stipulated, subject to the objection by the libelant that such a purported defense was incompetent, irrelevant and immaterial, that neither the seller nor the intervener had any notice of the illegal use, or intended illegal use, of the automobile.

"The government offered in evidence at the forfeiture proceedings the judgment roll, consisting of the indictment and sentence, in the criminal cases, at which, as stated above, pleas of guilty had been entered. The intervener in each case objected to the introduction of this judgment roll, on the ground that it was incompetent, irrelevant and immaterial; that no proper foundation had been laid; that the roll was not binding upon the intervener; and that it did not show that the intervener was a party to the criminal action or had notice of it. The objections were overruled and the records were admitted in evidence, to which the respective interveners duly excepted.

"Testimony of customs officers showed that the four automobiles were driven across the international boundary some distance into the United States before being searched and seized.

"The District Court entered decrees of forfeiture in all four cases, finding that each automobile 'was engaged in smuggling dutiable merchandise into the United States in violation of the customs laws thereof.'"

The four interveners having appealed to the Circuit Court of Appeals for the ninth circuit, that court certified for answer by this court the following questions (Judicial Code, section 239; 28 U. S. C., section 346):

"1. Does Section 26 of Title II of the National Prohibition Act repeal by implication and render inoperative in liquor importation and transportation cases the forfeiture provisions of the Customs Laws, in so far as offending vehicles are concerned? Or, putting the question in another form:

"2. Do the mandatory provisions of Section 26 of the National Prohibition Act apply when the automobile has been seized while in the act of transporting intoxicating liquor across the border and some distance into the United States?

"3. May the government, in such a case, ignore such mandatory provisions, arrest the driver, and elect to forfeit the automobile under the customs laws?

"4. Is the record in the criminal case wherein the driver pleaded guilty of violating the customs laws (Tariff Act of 1930) admissible in the separate forfeiture proceedings wherein the intervener is the only party appearing, for the purpose of showing unlawful importation by the automobile, or for any other purpose?"

The importation of intoxicating liquors without permit and without payment of customs duties is a violation of the tariff act and a criminal offense thereunder. This was the law under the tariff act of 1922, enacted after the adoption of the Eighteenth Amendment. Tariff Act of 1922, c. 356, sec. 593 b; 42 Stat. 982; U. S. C., Title 19, sec. 497. It is still the law under the present tariff act of 1930; U. S. C., Title 19, sec. 1593. True, the drivers of the cars who brought these liquors from Mexico into California were subject to prosecution under the National Prohibition Act, 27 U. S. Code, sec. 46. They were subject to prosecution under the tariff act also (*Callahan* v. *United States*, — U. S. —, April 11, 1932), and under that act they were indicted and convicted.

The appellants would have us hold that prosecution of the offender may be based at the election of the Government either on

the one act or on the other, but that forfeiture of the implements used in his offending may be based on only one of them. The consequence of such a holding would be to withdraw from the tariff acts remedies and sanctions existing for the better part of a century. Forfeiture of vehicles bearing smuggled goods is one of the time-honored methods adopted by the Government for the repression of the crime of smuggling. The provisions of the Revised Statutes, sections 3061 and 3062, which carried forward the provisions of earlier acts (Act of July 18, 1866, c. 201; 14 Stat. 178, sec. 3), have in turn been carried forward into the United States Code. U. S. Code, Title 19, secs. 482, 483. By implication, if not in express terms, they were recognized as law in the Tariff Act of 1922, which declares it to be the duty of any customs agent who has made seizure of a vehicle for violation of the customs law to turn the vessel over to the collector of the district (Tariff Act of 1922, c. 356, sec. 985; U. S. Code, Title 19, sec. 509). They are recognized by like provisions in the Tariff Act of 1930. Act of 1930, c. 497, sec. 602; U. S. Code, Title 19, sec. 1602. Indeed the same implication persists in the prohibition law itself. By section 1 of the act of March 3, 1925, c. 438; 43 Stat. 1116; U. S. Code, Title 27, sec. 41, "any vessel or vehicle summarily forfeited to the United States for violation of the customs laws, may, in the discretion of the Secretary of the Treasury, under such regulations as he may prescribe, be taken and used for the enforcement of the provisions of this title [i. e., the title, Intoxicating Liquors] in lieu of the sale thereof as provided by law" (cf. 27 U. S. Code, § 42). Certain it is therefore that vehicles carrying smuggled merchandise other than intoxicating liquors may still be seized and forfeited under the provisions of the tariff acts and those of the Revised Statutes ancillary thereto. The forfeiture may be enforced even against innocent owners, though the Secretary of the Treasury may remit it, upon such terms as he deems reasonable, if satisfied that there was neither wilful negligence nor intent to violate the law. R. S. § 378; Tariff Acts of 1922 and 1930, sections 613, 618. The penalty is at times a hard one, but it is imposed by the statute in terms too clear to be misread. Beyond all room for question, the owner of a vehicle bearing smuggled merchandise runs the risk of forfeiture, subject to remission by the grace of an administrative officer, where the merchandise is

medicine or wheat or drygoods or machinery; subjects of legitimate trade upon payment of the lawful duties. The argument for the interveners is that the intention of Congress was to make the risk a lighter one where the trade is wholly illegitimate, i. e., where the merchandise smuggled consists of intoxicating liquors. They tell us that perhaps a forfeiture under the tariff acts will be permitted when what is laden in the vehicle is partly intoxicating liquor and partly something else (cf. *Commercial Credit Co.* v. *United States*, 53 F. (2d) 977, 978, 979). They insist, however, that the remedy under those acts must be held to be excluded when liquor and liquor only is the subject matter of the carriage.

Section 26 of the National Prohibition Act (41 Stat. 305, 315; U. S. C., Title 27, sec. 40), which is quoted in the margin,* is said to lead to that bizarre result. We think its purpose is misread when such a meaning is ascribed to it. Section 26 of the National

*"'When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or aircraft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. . . .'"

Prohibition Act is not directed against smuggling, though the conduct that it does cover may be an incident of smuggling. The Eighteenth Amendment distinguishes the importation of intoxicating liquors into the United States from their transportation within, or their exportation from, the United States, just as it distinguishes each of these activities from manufacture and from sale. The National Prohibition Act maintains the same distinction. Sections 3061 and 3062 of the Revised Statutes are aimed at importation from without the United States, and not at transportation within. Section 26 of the National Prohibition Act is aimed at transportation within, and not at importation from without. We do not mean that the Government may not separate the transaction into its criminal components, and prosecute or forfeit, according to its choice, for the one constituent or for the other. Cf. *Callahan* v. *United States, supra.* It may elect to seize under the prohibition act for wrongful transportation (ignoring the preliminary or later acts of importation or exportation), and in that event the prosecution must proceed on the same basis. Cf. *Port Gardner Co.* v. *United States,* 272 U. S. 564; *Commercial Credit Co.* v. *United States,* 276 U. S. 226, 231; *Richbourg Motor Co.* v. *United States,* 281 U. S. 528. If the seizure is for transportation only, the owner of the vehicle will have whatever protection comes from section 26, and may reclaim what has been taken if he has acted in good faith. Restitution in such circumstances will be granted as of right, and not by an act of grace as it is where the seizure has been for evasion of the customs. Neither owner nor offender, however, has the privilege of choice between forfeiture upon the footing of illegal transportation and forfeiture upon the footing of a smuggled importation. The choice is for the Government.

We are told that this conclusion is inconsistent with *Richbourg Motor Co.* v. *United States, supra,* where seizure under another section of the Revised Statutes (section 3450) was held to be excluded. The section there considered had no relation to the customs. It had been adopted as an internal revenue law many years before the National Prohibition Act, at a time when the sale of intoxicating liquors for beverage purposes was still a lawful business. By its terms there might be a forfeiture of a vessel or other means of conveyance which had been used to remove goods or com-

modities with intent to defraud the United States of a tax imposed thereon. This provision was held to have been superseded in the circumstances there disclosed by the forfeiture provisions in the act prohibiting the transportation of intoxicating liquors. National Prohibition Act, sec. 26. We are unwilling to extend the ruling to a situation like the one at hand. Two grounds of distinction mark the limits of extension. The first is that in the *Richbourg Motor Company* case, the operator of the automobile was arrested at the time of the seizure and arraigned before a United States Commissioner on a charge of illegal transportation of intoxicating liquors. There was a clear election to go forward under the provisions of the prohibition act, and not under any other. Section 26 is explicit in its requirement that the officer seizing the vehicle under the authority of that section shall at once proceed against the person arrested "under the provisions of this title." By parity of reasoning the court held that when there has been arrest and seizure under section 26 because of wrongful transportation, the forfeiture of what has been seized must go forward on the same footing (cf. *Commercial Credit Co.* v. *United States,* 276 U. S. 226, 231; *United States* v. *One Ford Coupe,* 272 U. S. 321, 325). There is, however, a second ground of distinction that is independent of the conduct of the officer discovering the offense. It has relation to the difference between section 3450 of the Revised Statutes on the one hand and sections 3061 and 3062 on the other in respect of the wrong to be redressed. The act of removal from one place within the United States to another with intent to evade the tax upon spirituous liquors is one more nearly identical with that of transportation within the United States in violation of the prohibition law than is a wrongful importation in evasion of the customs. The bond of integration is closer and more intimate (cf. *United States* v. *American Motor Boat K-1231,* 54 F. (2d) 502, 505). Removal from one place within the United States to another in order to evade a tax is differentiated from unlawful transportation by the quality of the intent, and not by anything else. Importation is differentiated also by the nature of the act.

To refuse to give heed to these distinctions will lead us into a morass of practical difficulties as well as doctrinal refinements. If forfeiture of a vehicle seized in the course of importation must

always be under section 26, and not under other statutes, then the smuggler arrested at the same time must always be prosecuted under the prohibition act, and never for the smuggling, since seizure under section 26 must be followed, as we have seen, by prosecution of the arrested person under that title and no other. We cannot bring ourselves to believe that Congress had in view the creation of so great a breach in historic remedies and sanctions (cf. *United States* v. *American Motor Boat K-1231, supra*). Derangement of a system thus rooted in tradition is not to be inferred from a section aimed upon its face at transportation within the United States and not at importation from without (cf. *Maul* v. *United States,* 274 U. S. 501, 508). Repeals by implication are not favored (*Henderson's Tobacco,* 11 Wall. 652; *United States* v. *Tynen,* 11 Wall. 88, 92), and least of all where inveterate usage forbids the implication. Indeed, the breach, if we once allow it, will hardly be confined within the ramparts of the acts that regulate the duties upon imports. If a forfeiture under the customs laws is forbidden where there has been an unlawful importation of intoxicating liquors, we shall have difficulty in upholding a forfeiture where there has been a violation of the navigation laws or other cognate statutes. Already the net of these complexities has entangled the decisions (cf. *The "Ruth Mildred,"* No. 795, and *The "Sebastopol,"* No. 811, decided herewith). Courts accepting the conclusion that the customs forfeitures are ended in respect of intoxicating liquors have been unable to extricate themselves from the conclusion that forfeitures under the navigation acts have fallen at the same time. A halt must be called before the tangle is so intricate that it can no longer be unraveled.

We hold, then, that *Richbourg Motor Company* v. *United States, supra,* does not rule the case at hand. The question is one as to which the decisions of the other Federal courts are almost equally divided. On the one side are *United States* v. *One Ford Coupe Automobile,* 43 F. (2d) 212; *United States* v. *One Studebaker Automobile,* 45 F. (2d) 430; *The "Ruth Mildred,"* 47 F. (2d) 336; *Colon* v. *Hanlon,* 50 F. (2d) 353; *United States* v. *One Buick Coupe,* 54 F. (2d) 800. On the other are *The Pilot,* 43 F. (2d) 491; *United States* v. *One Reo Coupe Automobile,* 46 F. (2d) 815; *The "Daisy T.,"* 48 F. (2d) 370; *United States* v. *James Hayes,*

52 F. (2d) 977; *Maniscalco* v. *United States,* 53 F. (2d) 737; *United States* v. *American Motor Boat K-1231,* 54 F. (2d) 502. The list is not exhaustive. The courts of each group have invoked the Willis-Campbell Act (Act of Nov. 23, 1921, c. 134; 42 Stat. 222, 223, sec. 5), but have drawn opposing inferences from it. By that act, all laws relating to the manufacture, taxation and traffic in intoxicating liquors and all penalties for their violation in force when the National Prohibition Act was adopted, were continued in force except such provisions as are "directly in conflict with the provisions of the National Prohibition Act" (see *United States* v. *Stafoff,* 260 U. S. 477). The advocates of an implied repeal insist that there is a direct conflict between a statute whereby immunity for innocent lienors or owners is given as of right and a statute whereby immunity is on the footing of an act of grace. To this the retort is made by the opponents of repeal that the spheres of the two immunities are diverse and that the apparent conflict is unreal. Transportation within the United States is the sphere of the one, and importation from without the sphere of the other.

Of the four questions certified, those numbered two and three are adequately answered when we answer question number one.

The answer to question four may depend upon circumstances imperfectly disclosed in the certificate, and is not shown to be necessary. *White* v. *Johnson,* 282 U. S. 367.

The second, third and fourth questions are not answered, and the first question is answered "no".

Mr. Justice STONE took no part in the consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.